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No. 86.

Brf. of Davidge, Robinson & Robinson for D. C.

Supreme Court of the United States.

No. 86.

Filed Nov. 7, 1900.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

LEIGH ROBINSON AND CONWAY ROBINSON, JR., EXECUTORS OF THE LAST WILL AND TESTAMENT OF CONWAY ROBINSON, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR.

W. D. DAVIDGE,
Attorney for Defendants in Error.
LEIGH ROBINSON and
CONWAY ROBINSON, JR.,
Executors of the Last Will and Testament of Conway Robinson, Deceased, Defendants in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 11-6-1900

IN THE

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NOTE.—To avoid reprinting we use our Court of Appeals brief, which accounts for the expressions appellant and appellees where found therein, the same being appropriate in that court.

On August 28, 1882, said testator, Conway Robinson, in his lifetime, sued the District of Columbia for acts of trespass *de bonis asportatis* and *quare clausum fregit*, committed on June 1, 1880, and between that day and the commencement of suit, said declaration containing three counts in trespass *de bonis asportatis* and three counts in trespass *quare clausum fregit* (Rec., pp. 1 to 6).

To said original declaration appellant, on October 2, 1882, filed two pleas:

1st. Not guilty.

2d. *Actio non accrevit infra unum annum* (Rec., p. 6).

On October 11, 1882, issue was joined on said plea of the general issue and a demurrer was filed to said plea of limitations (Rec., pp. 7 and 8).

On March 10, 1883, said demurrer was sustained and limitations held to be badly pleaded (Rec., p. 61).

Said testator having thereafter died pending said action, his death was suggested on February 18, 1884 (Rec., p. 8), and on July 5, 1884, said action was revived in the names of his executors, and said executors (the present appellees) were then and there made parties plaintiff in the place of said testator (Rec., pp. 61, 62).

On November 28, 1884, leave was granted to amend the declaration (Rec., p. 62).

On October 29, 1886, an amended declaration was filed by appellees against appellant for acts of trespass *de bonis asportatis* and *quare clausum fregit*, committed in testator's lifetime, to wit, on June 1, 1880, and between that day and the commencement of this suit, said amended declaration containing two counts in trespass *de bonis asportatis* and two counts in trespass *quare clausum fregit*.

The first count thereof is in trespass *de bonis asportatis*, for taking, carrying away, and converting to its use, in testator's lifetime, 4,683 cubic yards of gravel, soil, and *subsoil* of their said testator (Rec., pp. 8 and 9).

The second count thereof is in trespass *de bonis asportatis*, and, like the first count, is for taking, carrying away, and converting to its use, in testator's lifetime, 4,683 cubic yards of gravel, soil, and *subsoil* of their said testator, but alleges further that said gravel, soil, and *subsoil* were taken and carried away by appellant from testator's close, called the "Vineyard," to points beyond the limits of said close, and were taken and carried away by appellant to and used by appellant upon certain public roads for repairing said public roads, none of which ran through or over testator's said close (Rec., pp. 9 and 10).

The third count thereof is in trespass *quare clausum fregit*, for breaking and entering testator's close, called the "Vineyard," in testator's lifetime, and then and there doing these and other wrongs, &c. (Rec. pp. 10 and 11).

The fourth count thereof is in trespass *quare clausum fregit*, for breaking and entering testator's close, called the "Vineyard," in testator's lifetime, and then and there digging, &c., the gravel, soil, and *subsoil*, &c., of said close and making an excavation, &c., about 386 feet long, about 50 feet wide, and about 14 feet deep in said close, and removing 4,683 cubic yards of gravel, soil, and *subsoil* from said excavation, and taking and carrying away and converting to its use such gravel, soil, and *subsoil*, and taking and carrying away the same from testator's said close, called the "Vineyard," to points beyond the limits of said close, and taking and carrying away the same to and using the same upon certain public roads for repairing said public roads, none of which ran through or over testator's said close. Said fourth count sets out fully and in detail and at large the various acts done and various injuries caused or inflicted by or resulting from such wrongful acts (Rec., pp. 11, 12).

Appellant was ruled to plead to this amended declaration on or before Tuesday, December 7, 1886, that being the first day of the first special term of the court occurring twenty days after service of said amended declaration (Rec., pp. 12, 64, 65), and notice to plead was acknowledged and accepted by appellant's attorneys (Rec., p. 13).

No plea whatsoever was filed on or before said rule day (December 7, 1886), *nor until long after said rule day.*

On December 30, 1886, *which was 23 days after said rule day*, appellant for the first time pleaded to said amended declaration, and then pleaded nothing but the general issue—not guilty (Rec., p. 13).

On October 23, 1895, *which was nearly nine years after said rule day*, appellant filed three additional pleas, viz:

1st. *Actio non accrevit infra tres annos* before the filing of the *amended* declaration.

2d. Possessory title.

3d. Common and public highway, &c. (Rec., pp. 14 and 15).

On October 24, 1895, demurrers were filed to these pleas (Rec., pp. 15 and 16). On October 25, 1895, said demurrer to appellant's second additional plea was sustained. Said demurrer to appellant's third additional plea of common and public highway, &c., was overruled, and, the court suggesting that on motion the court would strike out appellant's first additional plea of limitations, both because it could not be pleaded *relative to the filing of the amended declaration* and because it was filed *too late*, appellees moved the court accordingly to strike out said plea, and said motion was granted, and said plea of limitations was struck out for the reasons aforesaid (Rec., pp. 16, 62). Thereupon appellees joined issue upon appellant's third additional plea of common and public highway, &c. (Rec., pp. 16, 62). The case was tried in the early part of 1898, before Mr. Justice Cole, and on February 12, 1898, there was a verdict for appellees for $8,000 (Rec., p. 17). On April 2, 1898, judgment was entered on said verdict (Rec., p. 17). The District of Columbia appealed to the Court of Appeals (Rec., p. 17), where said judgment was affirmed (Rec., p. 81), and the case is brought here upon writ of error (Rec., pp. 81, 82), a bill of exceptions having been made part of the record (Rec., p. 18).

The record contains the following important statement, which is certified to as a part of the bill of exceptions, viz:

"THE FOREGOING BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE GIVEN BY BOTH PARTIES AT SAID TRIAL OF THIS CAUSE" (Rec., p. 39).

The important questions which arise on this appeal arise under pleadings to said amended declaration and as to rulings at said trial.

I.

DEATH OF PLAINTIFF, REVIVAL OF ACTION, AND AMENDED DECLARATION.

At common law all *rights or causes of action for torts* died on the death of the parties committing or receiving such torts, and all actions *ex delicto* abated on the death of the parties, plaintiff or defendant.

Statutes, however, passed from time to time have (with the exception solely of slander and of injuries or torts done to the person) altered and changed this state of things until now, in all cases (except as aforesaid), both the *action* and the *right or cause of action* survive such death. The statute of 4 Edw. 3, ch. 7, passed A. D. 1330, enacts:

"That executors, for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, shall have an action against the trespassers, and recover their damages *in like manner as they whose executors they be, should have had if they were in life.*"

1st British Statutes at Large, p. 203.

By this statute the *right* of action or *cause* of action, as contradistinguished from the *suit* or *action* thereon, is kept alive and prevented from dying with the party injured in all cases covered by said statute.

After the passage of this act the courts, by an equitable and somewhat liberal construction of it, held that not only *trespass*, but replevin, trover, case, and pretty much every action for torts to his personal property committed in testator's lifetime, could be maintained by his executor against such wrongdoer.

Smith *vs.* Colgay, Cro. Eliz., 384.
Rutland *vs.* Rutland, Cro. Eliz., 377.
Cockerill *vs.* Kynaston, 4 Term R., 277.

In a Massachusetts case arising under this statute the court say:

"If the plaintiff in replevin die, his executor * * * may come in and prosecute, within the *equity* of the statute of 4 Edw. 3, ch. 7."

Pitts' Executor *vs.* Hale, 3 Mass. R., 322.

In a South Carolina case under this statute the court say:

"The common law gives no remedy whatever, *to* or *against* executors for torts, or trespasses, &c. But the statute of Edw. 3 enables executors to bring those suits for injuries done to their testator."

Executors of Middleton *vs.* Robinson, 1 Day's R. (So. Ca.), 59.

And in another case in South Carolina under this same act, the court, Wilds, J., after referring to said statute of 4 Edw. 3, ch. 7, and to the common law as altered thereby, say:

"I think the rule may be safely laid down, if it has not been already so laid down, 'that for every injury done *to the estate* of a testator, or intestate, a right of action survives to his representatives.'"

Nettle's Executors *vs.* D'Oyley, 2 Brevard (So. Ca.), 30.

Chancellor Kilty in his report says of said statute of 4 Edward 3, ch. 7, that—

"This statute has been practiced under in the province and in the State, before the passage of the testamentary law. It is not inconsistent with that law, and therefore is not repealed by it; but inasmuch as by the fifth section of the eighth chapter thereof, it is in substance re-enacted, it is considered that the case is sufficiently provided for thereby."

Kilty's Report, p. 148.

Our three Maryland acts upon this subject—all of them in force in this District—are conclusive of the question of survivorship.

The Maryland act of 1785, chapter 80, section 1, enacts:

"That no action brought or to be brought in any court of law in this State shall abate by the death of either of the parties to such action, but * * * in case the plaintiff or plaintiffs, in any action aforesaid, shall die before the same may be tried and judgment given, and such death would abate the action before this act, the appearance of the heir, devisee, executor or administrator, as the case may require, or other proper person to prosecute such suits, *shall be admitted to be entered to the same.*"

The act at this point goes on to provide that if the proper person to prosecute such action do not appear he may be summoned to appear, and further provides that upon such summons being served upon him, &c., and he not appearing, he may be attached for contempt and fined or nonsuited for not appearing; and then the act continues as follows:

"And if the person or persons so summoned to prosecute the action shall appear to such action *at any time before judgment of nonsuit entered as aforesaid*, all proceedings in the action had before the death shall be considered as proceedings in the cause, and such other proceedings shall be had as may by the court be judged necessary and proper to bring the case fairly to trial; and the court shall have full power and authority, upon just cause being shown, to suffer any proceeding by the plaintiff or the defendant to be corrected or altered, and also shall have full power and authority to make, and cause to be executed, such rules and orders in the case, and to direct such proceedings therein, as may be judged necessary and proper to bring the merits of the question between the parties fairly to trial; and in all such cases such judgment shall be given as if the action had been originally brought by the plaintiff or plaintiffs so appearing, or summoned to appear, as aforesaid, and the costs accruing before the death shall be taxed as part of the costs in the action; * * * *and in case there be no appearance or proceeding by either party in any case aforesaid*

before the tenth day of the second court after the death shall be suggested, then the action shall be struck off the docket and discontinued."

Md. act of 1785, ch. 80, § 1.
Compiled Statutes, ch. 55, § 81, p. 457.

The Maryland act of 1798, chapter 101, subchapter 8, § 5, provides as follows:

"Executors and administrators shall have full power and authority to commence and prosecute *any personal action* whatsoever, at law, or in equity (as the case may require), which the testator or intestate might have commenced and prosecuted, *except actions of slander, and for injuries or torts done to the person.*"

Md. act of 1798, ch. 101, subch. 8, § 5.
Compiled Statutes, ch. 1, § 91, p. 22.

These two acts are, in effect, consolidated and reiterated by a subsequent chapter of the latter act, namely, by the Maryland act of 1798, chapter 101, subchapter 14, § 4, which provides as follows:

"*No personal action* shall abate by the death of either party, but executors and administrators shall notice and conform to the directions of the act of 1785, chapter 80, respecting their prosecution or defense of such action."

Md. act of 1798, ch. 101, subch. 14, § 4.
Compiled Statutes, ch. 1, § 92, p. 22.

In 1801 Congress by express law declared:

"That the laws of the State of Maryland as they now exist shall be and continue in force in that part of the said District which was ceded by that State to the United States, and by them accepted as aforesaid" (2 U. S. Stat. L., 104, 105, act of Feb. 27, 1801, ch. 15, § 1), and this law is reaffirmed and re-enacted by section 92, Revised Statutes District of Columbia.

The statutes mentioned above constitute the law in respect to survivorship and revivor in force in this District,

and are the law to be construed upon that subject in the case at bar.

By the act of 1785, chapter 80, § 1, *supra*, the *suit* or *action*, as contradistinguished from the *right* of action or *cause* of action, is kept alive and prevented from abating on the death of the plaintiff in all cases covered by that act.

The act of 1798, chapter 101, extends both to the *right* of action or *cause* of action (*with the exception solely of slander and of injuries or torts done to the person*), and also to the *suit* or *action* thereon; for by subchapter 8, § 5 thereof, the *right* of action or *cause* of action, as contradistinguished from the *suit* or *action* thereon, is (*except as aforesaid*) kept alive and prevented from dying with the person in all cases covered by that section; and by subchapter 14, § 4 thereof, the *suit* or *action*, as contradistinguished from the *right* of action or *cause* of action, is kept alive and prevented from abating in all cases covered by that section.

The case at bar is certainly neither an action of *slander* nor for injury or tort done to the *person*, but is an action of trespass *de bonis asportatis*, and of trespass *quare clausum fregit*. It is therefore within and covered by said § 5 of said act of 1798, and is not one of the cases excepted therefrom, and it is unquestionably within and covered by said § 4 of said act of 1798, and by said act of 1785, chapter 80, section 1.

It cannot be denied that the action in the case at bar is a *personal action*.

"*Real* actions are those brought for specific recovery of lands, tenements, or hereditaments. *Personal*, are those brought for specific recovery of goods and chattels, *or for damages*, or other redress, for breach of contract, *or other injuries* of whatever description, *the specific recovery of lands, tenements, and hereditaments only excepted.*"

Tyler's Stephen on Pleading, p. 39.

It is well settled that the executors were the proper parties to revive the action and were the only parties to do so.

In this action realty is not sought to be recovered; but, on the contrary, it is sought to recover *damages* for injury to property, which is something wholly separate and distinct from real estate. The injury having been committed in the lifetime of the testator, the right to compensation for that injury is *a chose in action* which on his death devolved on the executors, and when recovered it will be assets in their hands. If the executors could not support and maintain this action, no other person could, and there would be a wrong without a remedy.

"In torts to property, except the detention of freehold lands, the *executor* or administrator of the injured party may sue."

Evans' Practice, p. 78.

In a Missouri case the court say:

"Another point made by the defendant is, that a part of the damages sued for was for injuries done to the realty, and that the heir only, and not the administratrix, can maintain a suit for such damages. There is obviously nothing in this objection. *The whole cause of action had accrued before the death of Joseph Clark, and upon his death being suggested, his administratrix and legal representative was properly substituted as plaintiff in the suit,* under the statute relating to abatement of suits, by force of which the cause of action survives."

Clark's adm'x *vs.* R. R. Co., 36 Mo., 217.

A pertinent and instructive decision on this point was rendered by the supreme court of North Carolina in a case in which the plaintiff died in an action of trespass *quare clausum fregit*, and his devisee came into court and became party plaintiff. On an appeal from a verdict and judgment in favor of such devisee, the appellate court reversed the judgment, saying:

"There is an error apparent on the record, &c., and on account of which the judgment must be reversed. William Dobbs, who instituted the action, died pending the suit, and

thereupon 'Penelope Dobbs, the widow and *devisee* under the last will and testament of William Dobbs, came into court and was made party plaintiff.' At common law the action of trespass could not be maintained by or against representatives. By our act of 1799, ch. 532, it is declared that the action of trespass, 'where property is in contest, and such action is not purely vindictive,' together with certain other actions therein enumerated, shall not abate or be discontinued by the death of either party, plaintiff or defendant; but the same shall and may be revived in the manner prescribed for the revival of other actions. The manner referred to is by an application to the court of the heirs, executors or administrators of the plaintiff if *he* hath died, or by bringing into court the heirs, devisees, or executors or administrators of the defendant, if it be *his* death that renders a revival of the suit necessary. Whether the action is to be revived by or against heirs or by or against the personal representatives must depend upon the nature of the action. *Trespass is purely a personal action sounding wholly in damages. A right to recover a recompense for damages sustained is a chose in action, which if permitted to survive the person damaged, survives to his executor or administrator. The heir or devisee has no interest in or claim to it, and cannot therefore either originally prosecute a suit for it, or revive one that has been instituted in the life of the person injured.*"

Dobbs *vs.* Gullidge, 4 Devereux & Battles, 69.

In the original declaration (Rec., pp. 1 to 6), filed in the lifetime of the testator, damages were laid to him. In view of the decision in Kennerly, ex't'x, *vs.* Wilson, 1 Md., 106 to 109, which was an action of trespass *quare clausum fregit* by an executrix, the appellees in the case at bar amended their declaration so as to lay the damages, in accordance with that decision, to their testator and to themselves as such executors. In the case last above mentioned, the county court having sustained a demurrer to the declaration, the court of appeals of Maryland say:

"This is an action of trespass *quare clausum fregit*, brought by the appellant, *as executrix* of Caleb Kennerly, against the appellee, to recover damages *for a trespass committed on the*

lands of the plaintiff's testator in his lifetime. * * * The question then submitted to our consideration is, Did the right of action survive to the executrix, the plaintiff in the present case?

"By our act of assembly of 1798 (ch. 101, subch. 8, sec. 5) it is provided that executors and administrators shall have full power and authority to commence and prosecute any *personal action* whatever, in law or in equity, which the testator or intestate might have commenced and prosecuted, except actions of slander and for injuries or torts done to the person. * * * The books upon pleading divide the different actions at law into three classes, viz: real, personal, and mixed. *Suits for damages for injury to real property are classed among the 'personal actions.'* If therefore the language of the act of 1798 is to be construed strictly, *the present cause of action is, in express terms, embraced in that law, and made to survive to the executor or administrator.* But it has been urged that the words '*personal action*' are not to be taken in their technical, strict sense, but are to be regarded as giving the right to executors and administrators only to bring and prosecute suits *relating to the personal property of the deceased.* * * * We cannot attribute to the legislature any such design, but must suppose they intended to give a different or literal meaning to the language they employed. If this act was to relate only to suits respecting the *personal property*, we are at a loss to find a reason why actions of slander and assault and battery were excepted from its provisions. If the construction contended for be the correct one, then two actions would have been by *implication* excepted, as well as the action of trespass *q. c. f.* If, on the other hand, an *express exception* was necessary to exclude the two (slander and assault), it would have been equally necessary to exclude this action of trespass. * * * *We are clear in our opinion, for the reasons expressed, that the present action can be maintained.*

"The court, however, is of the opinion that there is a fatal objection to the declaration, which was sufficient to justify the county court in sustaining the demurrer. The declaration does *not* conclude by alleging that the *plaintiff* sustained any damage by reason of the injury complained of, but concludes by averring 'that the said Caleb (*the testator*), in his lifetime, was worse, and had damage to the value of $1,500,

and thereupon this suit is brought.' *We can find no authority or precedent which would sanction such a declaration.* * * * The true theory upon which these actions rest would seem to be, not that the injury to the testator, and the damages resulting therefrom, constituted the immediate cause of action in the executor, *but that the withholding of the damages by the party complained of diminishes the personal assets, and thereby occasions an injury to the representative of the personal estate, which would authorize and require him to sue and lay the damages in his own name.* We are at a loss to understand how a verdict and judgment could be rendered upon a declaration where no damages are laid to the *plaintiff*."

Kennerly, ex't'x, *vs.* Wilson, 1 Md., 106 to 109.

The statutes and the decisions to which we have referred *supra*, together with the case of Keyser *vs.* Fendall, to which we will also refer in a moment, are conclusive in the case at bar of the fact:

1st. That the *right* of action or *cause* of action did not die with the testator's death, but survived such death.

2d. That the *suit* or *action* based thereon did not abate with the testator's death, but survived such death.

3d. That both the *right* of action or *cause* of action and the *suit* or *action* based thereon survived to testator's *executors*, and that testator's *executors* were the proper parties to come in as parties plaintiff and revive the case.

4th. That the case was duly and properly revived in all respects and *in proper time.*

Where administrators pleaded to an amended declaration (their intestate having been defendant to the original declaration), that *no summons was issued to them, or notice of the pendency of the action given to them or appearance entered by them* before the 10th day of the second court after their intestate's death was suggested, and plaintiffs, without deny-

ing these facts, set forth that *after* such suggestion of death and *before* the 10th day of the second court after such suggestion, plaintiff *moved* the court to summon said administrators to appear and defend the action, and the court *granted* said motion and *ordered* that a summons issue against said administrators to appear and make themselves defendants in place of their intestate, and said administrators demurred to such replication, *the general term held* that the replication showed *a proceeding by a party* within the time prescribed, which prevented the action from abating under the act of 1785, chapter 80, section 1, that court saying:

"We come finally to the plea filed by the administrators of Hume, or rather to their demurrer to plaintiff's replication thereto. It is claimed upon this demurrer that the action against them should be stricken from the docket and discontinued, in pursuance of the Maryland act of 1785, ch. 80, § 1."

After quoting at some length from said act, the court continue as follows:

"The same statute further provides that 'in case there be no appearance *or proceeding by either party* in any case aforesaid before the tenth day of the second court after the death shall be suggested, then the action shall be struck from the docket and discontinued.'

"The replication sets forth that after the suggestion of death, and on the same day therewith, the plaintiff moved the court 'to summon said administrators to appear and defend the action in said cause,' and thereafter said motion was granted by the court, and it was ordered by the court * * * that a summons issue against said administrators to appear and make themselves defendants," &c.

"*It is to be observed that the act of* 1785 *provides for discontinuance of the action only in case there is either* no appearance by the administrator or executor, *or no proceeding at all by either party* before the tenth day of the second term after the suggestion of death. *It is immaterial that the administrators have not actually been summoned, or that the summons has not*

been issued by the clerk, who alone can issue it. The question is whether the plaintiff *has taken any proceeding toward this end.* Without an appearance or steps by which the legal representatives are made parties to the action, he could not have judgment against them, *but it does not follow that the action is meantime to be discontinued because they have not been made actual parties, although the plaintiff has taken proceedings in order to make them parties.*"

Keyser *vs.* Fendall, 5 Mackey, 62.

Appellant's attorneys are trying to blow hot and cold at the same time. They say defendant's first prayer (Rec., p. 44) should have been granted—

"Because the cause of action did not survive to the *executor*, but was transmitted to the *devisees* or *heirs*-at-law."

Appellant's Brief, pp. 26, 27.

And yet in this same brief they say:

"The plaintiffs, *as his* (the deceased plaintiff's) *executors*, might have availed themselves of the provisions of the Maryland act of 1785, ch. 80, sec. 1, and by proper proceedings *might have been admitted to prosecute the suit as his* (the deceased plaintiff's) *successor in title* and have the benefit of the proceedings already taken therein."

Appellant's Brief, p. 14.

In the face of the statutes and decisions to which we have called the court's attention, it can neither be seriously argued that the cause of action was transmitted to the devisee or heir, nor can it now be for a moment denied either that it *survived to the executors*, or that they (*the executors*) could appear to the action, be made parties plaintiff to the same, and prosecute the same, just as was done in the present case.

Appellees' Brief (p. 14) would lead the court to suppose, however, and appellees' attorneys, from what is said at page 14 thereof, are apparently not only willing that the court should believe that after the suggestion of death, on Febru-

ary 18, 1884, the *executors* failed or omitted *to come in or appear* to the action until the filing of their amended declaration on October 29, 1886, but are also willing that the court should believe that during said period there was *no proceeding by either party*, although appellant's attorneys ought to know very well that the facts were precisely the other way.

As a matter of fact, the death of plaintiff was suggested on February 18, 1884. (Rec. p. 8). Long *before* the 10th day of the second court after such suggestion, to wit, on July 5, 1884, the executors came into court and suggested that they had duly qualified as executors of said decedent in the orphans' court of this District and filed evidence of their due appointment and qualification as such executors, and then and there moved the court for leave to prosecute said suit in the place of said deceased against said defendant, and thereupon (on July 5, 1884) it was ordered that the appearance of said Leigh Robinson and Conway Robinson, Jr., as executors, as aforesaid, be, and the same was thereby, then made of record, and that said suit stand revived in their names and be in the same plight and condition as when the plaintiff departed this life; and on November 28, 1884, which was also *before* the tenth day of the second court after the suggestion of death, on *motion* of the plaintiffs (executors, as aforesaid), by their attorneys, leave was granted them to amend their declaration as they might be advised. (Rec. p. 62).

(Rec. p. 61, 62)

These proceedings were in ample time to prevent and certainly prevented the case from abating or from being struck from the docket and discontinued.

It is proper to say just here that striking an action off the docket and discontinuing it under the last clause of the act of 1785, ch. 80, § 1, although it brings that particular suit or action to an end, no more prevents a new action from being brought upon the same cause of action than any ordinary discontinuance, *nolle prosequi*, or nonsuit (the merits not being adjudicated or passed upon in the one case any more

than in the other), provided the *right* of action or *cause* of action survives such death and does not die with the person (and we have just seen that the *right* of action or *cause* of action survives in the case at bar under the acts of 4 Edw. 3, ch. 7, and 1798, ch. 101, subch. 8, § 5). A defendant must set up a matter of this kind as a defense, or plead it in abatement of the action *before pleading to the merits*, for the filing of a plea to the merits or in bar of the action is a waiver of all dilatory defenses and *matters of abatement*.

In the case at bar no plea in abatement was ever filed in this cause, no such defense was ever interposed to the amended declaration, and no such issue was before the court below; but, on the contrary, the general issue and other pleas in bar were pleaded by the defendant to the amended declaration (Rec., pp. ~~13~~, 14, 15), and, as stated above, such pleas to the merits operate as and constitute a *waiver* of any such matter of abatement or dilatory defense.

~~As to appellant's statement (Appellant's Brief, p. 27) that defendant's 1st prayer (Rec., p. 44) should have been granted because, in the opinion of appellant's attorneys, the evidence showed a public highway by prescription or by dedication, it is only necessary to say that, in the opinion of appellees' attorneys, the evidence overwhelmingly established that there was no public road or highway, either by prescription or dedication or in any other way, and it would have been a clear error for the court to take such a question of fact from the jury.~~

We submit, therefore, that defendant's 1st prayer (Rec., p. 44) was properly refused, ~~and that there is nothing in appellant's 11th assignment of errors (Appellant's Brief, pp. 19, 26, 27).~~ For like reasons, we submit that defendant's 14th, 15th, 16th, and 17th prayers (Rec., p. 47) were properly refused, ~~and that there is nothing in appellant's 23d assignment of errors (Appellant's Brief, pp. 13, 32).~~

II.

LIMITATIONS CANNOT BE PLEADED TO AN AMENDED DECLARATION THAT IS NOT EQUIVALENT TO A WHOLLY NEW ACTION; NOT PLEADABLE AFTER THE RULE DAY; WAIVED BY PLEADING TO THE MERITS AND LETTING THE RULE DAY PASS WITHOUT PLEADING THE STATUTE.

First. The following decision of the general term is pertinent and directly in point:

"Where in the original declaration a good cause of action is defectively stated, an amendment *which does not introduce a new cause of action*, but merely corrects the defective statement, *does not admit of the application of the statute of limitations if the claim was not barred when the suit was commenced.*"

U. S. *vs.* O'Leary, 19 D. C., 118, 132.

And previously, in another decision, the general term said:

"The declaration here was not a declaration totally defective by reason of failing to state any cause of action. It was at most a declaration stating imperfectly a good cause of action, and the difference is well recognized by the books between *the defective statement of a good cause of action* and *the statement of a defective or bad cause of action.* The *one* is capable of *amendment;* the *other*, of course, is *not.*

"The earmarks are too unmistakable to not identify the *transaction* as being the same, and so long as the court can see, when an amendment is proposed, that it states *the same cause of action* which was at first *imperfectly* stated, the statute of limitations is referable to the date of the *institution* of suit."

Lewis *vs.* W. & G. R. R., 6 Mackey, 557, 558.

In still another case, where a declaration was filed in time and was afterwards amended to correct a defect *and not*

to introduce a new cause of action, it was held that *limitations could not be pleaded thereto*, the general term saying:

"We think that the court was right in holding that the defense of limitations must be pleaded with reference to the *commencement of this suit*, and not with reference to the filing of this *amendment*."

Moses *vs.* Taylor, 6 Mackey, 278.

In a Georgia case the plaintiff in her original declaration sued *as an individual*. Pending the action, she amended her declaration so that by such amendment she sued *as the executrix of her husband*. The court say:

"After the amendment as before, the suit is the *same suit*, and *not another*; and *if the same*, the time when the declaration was filed is the time when it was *commenced*. * * * The very object of allowing it is to avoid the consequences *of defeating the pending action* and the *institution of another*. One of these consequences might be a bar by the statute of limitations. * * * If the first action, as a whole, is to be saved by amendment at all, why not save it as against the statute of limitations? In the present case the suit was in time, if the suit tried was identical with that begun when the declaration was filed; but it was too late if the amendment inaugurated a *new* action. *We think the former is the correct view, and that the statute of limitations has no more application since the amendment than it had before.*"

Tift *vs.* Towns, ex'tx, 63 Ga., 240, 241.

In another Georgia case, where demises in ejectment described the lessor *as a mere individual* or *as heir-at-law of a named decedent* and were amended so as to describe him *as executor of the same decedent*, it was held that such amendment *related back to the* COMMENCEMENT of the action, and *that prescription would not mature in the opposite party by reason of delay to amend*. The court say:

"When an amendment is made which grasps the whole action and embraces the sole party plaintiff, *is it not obvious that it must blend with and merge in the original case*, merely

changing without *destroying* it? * * * Amendment always conservative, *never destructive*, &c. * * * T whole scheme of amendment to pleadings looks to *uphing* the action or defense *in aid of which the amendmen authorized.* It never was heard of that the making of a spec amendment pointed out in a statute would, *ipso facto*, ter nate the pending suit *and inaugurate another.* Whenever amendment is needed, there is something defective in the strument of pleading which stands in need of it. If mak the alteration or supplying the deficiency in the prescri way will not put an end to the case in *all* instances, w should it in *any?* What is there in a misdescription of plaintiff or in a deficient description of him or of his t which renders it necessary, or even proper, *that amendin should destroy the identity of the action*, when various ot amendments, EQUALLY MATERIAL TO A RECOVERY, might made without working any such result? Once settle t a given amendment to a declaration *can properly be mad* that is, that it is *both authorized and appropriate*, and it lows logically that the making of it *tends to preserve and ward the action*, and *not to overthrow or extinguish it.* To t end was the privilege of amendment established. Ame ment is *completion* of the *incomplete*, or *correction* of the *in rect*, and as well might it be said that judicious additi to or alterations of an edifice *will cause it to fall*, as t judicious amendment to a declaration *will destroy the c* and if the suit *is in legal identity the same suit* after amendment as it was before, *there would be and could b running of the statute of prescription whilst it was pending.*

Rutherford, ex'r, *vs.* Hobbs, 63 Ga., 247 to 249.

In an Illinois case a suit on a policy of insurance originally commenced in the name of Thomas as plai for the use of J. and H. Mann, but Thomas' name subsequently stricken out by leave of court and the na of the Manns substituted as plaintiffs and the suit th after prosecuted in their names until later on, by leav court, Thomas' name was restored as plaintiff in the ca for the use of J. and H. Mann, as originally commenced

Upon the substitution being made the defendant plea

limitation, and the question was whether the statute merely ran down to the commencement of the action or continued to run down to such substitution of parties. The court say:

"There is *no* just ground for the claim that, by reason of the amendment making new parties plaintiff, there resulted *any change* in the cause of action. The *object* of the suit after the amendment was precisely the same as it was before, namely, *to recover the amount of the policy on account of the destruction by fire of the insured premises*, and, so far as we can see, assuming there was a right of recovery at all, it was and is a matter of total indifference to the company whether the recovery is *in the names of the Mannes* or *in the name of Thomas for their use*."

Thomas *vs.* Fame Ins. Co., 108 Ill., 100.

In another Illinois case the plaintiff filed an additional count, to which the defendant pleaded that the cause of action therein stated did not accrue within the statutory time next before "*the exhibition of said additional count.*" This plea being held bad on demurrer, and an appeal taken from that decision, the court above say:

"Appellant contends this was error. We do not think so. * * * It (the additional count) was merely another mode of telling the same story. *Had plaintiff recovered a judgment on the first count alone, and had he brought a subsequent action stating a cause of action precisely as stated in the second count, the second declaration might have been successfully answered by a plea of a former recovery setting out the record of the first action.*"

Rolling Mill Co. *vs.* Monka, 107 Ill., 343.

Where a creditor's bill alleged an indebtedness on "*certain promissory notes*," but described only *one* note and filed *it* only as an exhibit, the answer having made defense against "*any note or notes*" of the party indebted, it was *held* "that any promissory notes of such party held by complainant at the time the bill was filed are embraced within its allegations, *though filed as claims for the first time after*

the cause was remanded, and it was also *held* that the plea of *limitations* cannot be sustained as to such of said claims *as were not barred by limitations when the bill was filed*."

Williams *vs.* Banks, 19 Md., 23, 39.

In a New Jersey case the declaration was originally framed and the action brought upon the supposition that certain property came to the hands of *Mr. Wilson during his lifetime*, and it afterwards appearing that said property came into the possession of *Mrs. Wilson soon after her husband's death*, an amendment was ordered, so that the *declaration* would conform to the *facts*. It was urged that there should have been a nonsuit *upon the ground that the amendment was a new suit, and so was barred by the statute of limitations*; but the court said:

"The amendment was made because *the cases*, as stated originally and as amended, were *formally different*, but *substantially identical*. Otherwise it would not have been an *amendment*, but a *substitution* of *one* cause for *another substantially different*, and *beyond the power* of the trial judge there or this court to make."

Guild, ex'r, *vs.* Parker, 43 N. J. Law, 434.

In the case at bar appellant contends that the *amended* declaration is *a new and independent action*. Appellant's ~~Brief (p. 11) so~~ contends, and asserts that appellees in said *amended* declaration "set up a cause of action in *themselves*." The counts of said *amended* declaration conclude with the averment: "Wherefore the said plaintiffs say that the said Conway Robinson, their testator, was injured and sustained damage, and that *they, the plaintiffs*, are injured and have sustained damage, &c., and therefore *they* bring *their suit*." (Rec., pp. 8 to 13). This averment ~~is~~ has been referred to by appellant's ~~Brief (p. 11)~~, in support of appellant's theory that the amended declaration sets up *a new and independent action*.

Appellant, however, wholly ignores and overlooks the fact that all the trespasses set forth in said amended declara-

tion are therein alleged to have been committed "*during the lifetime of Conway Robinson, the plaintiffs' testator, to wit, on the 1st day of June, A. D.* 1880, *and on divers other days and times between that day and the commencement of this suit*" (Rec., pp. 8 to 13). All the acts complained of in said amended declaration, it alleges, were "*then*" done. Not a solitary thing does it allege to have been done *after said testator's death*.

Appellees conclude said amended declaration, as they properly should, by averring injury and damage to their said *testator* and to *themselves as his executors;* but the injury and damage *to themselves as such executors* is only such injury and damage as the law *implies* from the aforesaid acts committed *in vita testati*. Just as in assumpsit brought upon an *implied* promise, *the declaration must allege a promise*, though no promise ever existed or was in fact made, whilst at the trial the plaintiff is not obliged to prove an *actual* promise, but is only required to prove *facts* from which the law can *imply* such promise; so in an action like that in the case at bar it is proper to *allege in the declaration* the commission of acts *in vita testati* and injury and damage resulting therefrom to said testator and *to his executors;* yet at the trial the executors are not required to prove that injury and damage *actually* accrued to them beyond proving injury to their testator and damage resulting therefrom, which by diminishing the personal assets *imply* injury and damage to said executors as representatives of the personal estate.

It cannot be denied that during the entire lifetime of said testator the *original* declaration *correctly and properly set forth a good cause of action*. It cannot be denied that the very identical cause of action and the very action itself in said testator, as aforesaid, were by the statutes referred to in the first chapter of this brief *cast upon, transferred to, and vested in* the appellees as executors of said testator. It cannot be denied that, apart from all other statutes authorizing

amendments, the act of 1785, ch. 80, § 1, quoted in the first chapter of this brief, expressly authorizes, in just such cases, any and all amendments that may be necessary to bring the *merits* of the question between the parties *fairly to trial*. It cannot be denied that under the statutes referred to both the substitution of said executors as parties plaintiff and subsequent amendment of the declaration were authorized and appropriate. It cannot be pretended that the statutory transmission to testator's executors of a perfectly good cause of action, properly and correctly set forth in the original declaration, could result in making it in said executors a cause of action *so totally defective as to be incapable of amendment*. It cannot be said that said statutes transmitted to or vested in said executors any new or different or other suit or action from that which was vested in their testator in his lifetime. The earmarks are too unmistakable not to identify the *transaction* in the original and amended declarations as being the same.

Had said testator recovered a judgment in his lifetime on the original declaration, and had his executors brought a subsequent action stating a cause of action precisely as stated in said amended declaration, can any one doubt for a moment that such subsequent action by said executors might have been successfully answered by a plea of a former recovery, setting out the record of the first action by their testator?

Look at it as you will, it is perfectly manifest that the amended declaration *does not set up a new and independent cause of action*, and so the statute of limitations could not be pleaded as of the time of filing said *amended* declaration, or availed of as a defense to said *amended* declaration, the *original* declaration having been unquestionably filed in time to avoid it.

Secondly. Had it been permissible to so plead limitations to the amended declaration, still it was not available, because it was too late to set up such a defense.

"No dilatory plea can be received after the rule day, unless the fact upon which it is founded occurred subsequent to the rule day."

Whittington *vs.* Farmers' Bank, &c., 5 H. & J., 489, 490.

The court of appeals of Maryland in several cases has said:

"The plea of limitations has been adjudged *not* to be a plea to the *merits*, and the universal practice has accordingly been never to permit it to be amended and *to demand that it should be filed by the rule day.*"

Kunkel *vs.* Spooner, 9 Md., 472.
Wall *vs.* Wall, 2 Harris & Gill, 81.
Nelson *vs.* Bond, 1 Gill, 221.

It is never permitted to be pleaded after the rule day, unless on affidavit showing it to be necessary for the justice of the case.

McIver *vs.* Moore, 1 Cr. C. Ct., 90, 91.
Thompson *vs.* Afflick, 2 Cr. C. Ct., 46.

Where the statute of limitations was interposed for the first time after the cause was remanded, the court, speaking of the plea of *limitations*, say:

"In any view of the question, that plea could not be considered, *having been made too late.*"

Williams *vs.* Banks, 19 Md.

It has been held that "*a general continuance* does not enlarge the time for filing the plea of limitations."

Nelson *vs.* Bond, 1 Gill, 218.

In an action of trespass *vi et armis*, for breaking and entering the close of the plaintiff, &c., the defendant pleaded the statute of limitations, but pleaded *actio non accrevit infra*

duos annos, instead of *actio non accrevit infra tres annos*. The plea was demurred to and motion made for leave to amend.

"*The court*, on full deliberation and examination of the authorities, determined that as the plea of limitations was *not* a plea to the *merits*, it should *not be received after the rule day, nor amended if pleaded defectively.*"

Lamott *vs.* McLaughlin, 3 H. and McH., 324.

"The plea of the statute of limitations must be interposed at the earliest stage of the pleading which discloses its applicability."

Wiard *vs.* Semken, 19 D. C., 475, 480.

If the plea of limitations is not filed by the rule day, it will be *struck out*. In a Maryland case the court say:

"We are of opinion that the action of the superior court was right in *striking out* the eighth plea (limitations) if it was not filed within the time prescribed by the rule of court, and we must presume that the court acted in conformity with its own rule in the absence of the rule from the record."

Turnpike Co. *vs.* The State, 19 Md., 293.
Scott *vs.* Lewis, 2 Cr. C. Ct., 203.

Thirdly. Before the filing of the plea of limitation to the amended declaration appellant had *waived* the right to plead the statute of limitations.

Where the time for pleading had been extended, it was urged that *the extension of the rule to plead* gave the defendant liberty to file a plea of limitations *within the extended time;* but the court said:

"This would be rather a strange effect * * * if it conferred upon him *a right which he had lost by his default*, to wit, to plead any *other* plea than one to the *merits*."

Nelson *vs.* Bond, 1 Gill, 221.

Chancellor Kilty says:

"I consider the practice, as to the act of limitations, to be similar to that of the courts of law. *If the defendant, in his*

answer, contests the claim in any OTHER *manner*, without pleading, or relying on the act, HE CANNOT AFTERWARDS RESORT TO THAT DEFENSE."

McMechen *vs.* Chase, 1 Bland's Ch., 85, note *c*.

And in a subsequent case Chancellor Bland says:

"*Where a claim is made in the ordinary mode by bill, and the defendant, by his answer, in any manner contests, it without relying on the statute of limitations, he cannot be permitted to resort to that defense after* HAVING THUS TACITLY WAIVED IT."

Welch *vs.* Stewart, 2 Bland's Ch., 41.

S. P., Cook *vs.* Carr, 20 Md., 415.

Where by leave of court a declaration was amended at the trial table, and *after the amendment was made three witnesses were examined by plaintiffs and cross examined by defendant*, and then the latter moved for leave to plead limitations; the plaintiffs objected, but the court below overruled the objection and allowed the plea to be filed; to this ruling the plaintiffs excepted, and on an appeal from a verdict and judgment for defendant the court of appeals of Maryland said:

"The plea of limitations is not a plea to the merits, and the universal practice in this State has been never to permit it to be amended nor to be filed after the rule day. Now, if it be conceded that the amendment of the second count in the declaration was of such a character as to give the appellee the right to amend his pleadings and to plead the *statute of limitations*, a question we are not to be understood as deciding, *it is very clear that the plea was not filed in time.* If the defendant had the right and intended to interpose this plea, it should have been filed *immediately after the plaintiffs' amendment of the second count.* Having failed to do this and *having proceeded with the trial with the plea already in the case*, HE MUST BE CONSIDERED AS HAVING WAIVED THE RIGHT TO PLEAD LIMITATIONS, and it was *too late* to offer such a plea after the plaintiffs had examined their witnesses. The judgment must therefore be reversed and a new trial awarded."

Griffin *vs.* Moore, 43 Md., 253.

Now, in the case at bar service of the amended declaration and notice to plead were acknowledged and accepted by appellant on October 29, 1886 (Rec., p. 13). By their rules the special terms of the court commenced on the first Tuesday of every month except August, in which month there was no term of the court.

By the terms of said notice to plead and of said acceptance of service (Rec., p. 13) and of the rules of the court below, appellant was required to plead to said amended declaration on or before the rule day, which occurred on *Tuesday, December 7, 1886*, that being the first day of the first special term of the court occurring twenty days after service was, on October 29, 1886, accepted, as aforesaid. (Rec. pp. 64, 65).

Appellant filed no plea whatsoever to said amended declaration till *December 30, 1886, which was 23 days after the rule day*, and then merely filed the general issue (Rec., p. 13). Not until October 23, 1895, *which was nearly* 9 years after the rule day, did the appellant file or attempt to interpose any plea of the statute of limitations to the amended declaration (Rec., p. 14).

Now, even had the amended declaration been equivalent to a *wholly new and independent action* and entitled appellant upon the filing thereof to plead the statute of limitations to it, yet the fact of appellant having on December 30, 1886, pleaded to the merits and having afterwards *waited until nearly nine (9) years after the rule day* by or before which limitations, if pleadable at all, should have been pleaded *constituted a waiver* of any such defense. Said plea was certainly offered altogether *too late* to be received or accepted, even if it had been correctly pleaded instead of being *defectively* pleaded.

A case arose in Virginia which is in point. In it *a plea was demurred to and the demurrer sustained;* afterwards that order was rescinded, the joinder in demurrer and demurrer withdrawn, and then, *on motion of the plaintiffs, the plea was struck out by the court.* This was substantially the

same in effect as what was done in the case at bar. The court of appeals of Virginia say:

"The plaintiffs in error assign as ground of error: 1. That the demurrer was sustained. 2. That the order sustaining the demurrer was rescinded and the plea struck out. * * * *If the plea was bad, the striking it out cannot be assigned as error.* THE PLAINTIFFS IN ERROR NOT HAVING BEEN DEPRIVED OF ANY DEFENSE BY THE STRIKING OUT OF THIS PLEA, HAVE NOT BEEN INJURED BY IT AND CANNOT COMPLAIN."

Fant *vs.* Miller & Mayhew, 17 Gratt. (Va.), 67.

In an action of debt, brought in Virginia upon a Maryland judgment, *nil debet* was pleaded and issue joined thereon. At the next term, without such joinder of issue being *actually* withdrawn or vacated or a demurrer *actually* filed, there was a judgment entered for the plaintiffs *as upon a general demurrer* by them to the defendant's plea of *nil debet*. The court of appeals say:

"The court, therefore, erred in receiving the plea, and might very properly, at a subsequent time, correct that error *by setting aside the issue and the plea.* It has done this, *substantially*, by entering a judgment *as if there had been a demurrer.* * * * Even if there was none, the court having done what was right, *we cannot reverse its act because it has not done it in the right way;* since the mode of doing it has no influence upon the justice of the case."

Kemp *vs.* Mundell, 9 Leigh (Va.), 16.

Upon the authorities to which we have referred and for the reasons stated above, we respectfully submit that said defense of limitations was *defectively* pleaded, was *not amendable*, was pleaded *too late*, and was *waived;* and that appellant is in no way injured by the ruling of the court below concerning it, ~~and that there is nothing in appellant's first assignment of errors.~~

III.

APPELLANT'S SECOND ADDITIONAL PLEA TO THE AMENDED DECLARATION IS BAD ON DEMURRER.

Look at it as you will and you must reach this conclusion.

It does not allege a *freehold* title, but a mere *possessory* right or title. It fails to allege any *specific* title, or to allege the *derivation* or *commencement* of title. It fails to give either *express color* or *implied color.*

Stephen says:

"In general, it is sufficient to state a *seizin in fee-simple per se*—that is, simply to state * * * that the party was seized in his demesne as of fee of and in a certain messuage, &c., without showing the *derivation* or (as it is expressed in pleading) the *commencement* of the estate. * * * With respect to *particular estates*, the general rule is *that the commencement of the particular estate must be shown.* If, therefore, a party sets up in his own favor an estate tail, an estate for life, a term of years, or a tenancy at will, he must show the *derivation* of that title from its *commencement*—that is, from the last seizin in fee-simple."

Tyler's Stephen on Pl., 290, 291, 292.
1 Chitty on Pl., *504.

The *derivation of title, its quality and nature*, must be stated in its *full and precise extent.*

Tyler's Stephen on Pl., 293 to 296.

The author, however, mentions an important exception to the rule that the plea must allege the title in its *full and precise extent*, saying:

"In lieu of this, it is occasionally sufficient to allege what may be called a *general freehold title.* In a plea in trespass *quare clausum fregit*, * * * if the defendant claim an estate of *freehold* in the *locus in quo*, he is allowed to plead

generally that the place is his '*close, soil, and freehold.*' This is called the plea or avowry of *liberum tenementum.* * * * In alleging a *general freehold title*, it is not necessary to *show its commencement.*"

Tyler's Stephen on Pl., 296, 297.

On this question Chitty says:

"The plea of *liberum tenementum* states a *general freehold title* without defining the quality or nature of such title. It states that the *locus in quo* was and is the *close, soil, and freehold* of the defendant, &c. * * * The plea was peculiar and formed an *exception* to the general rule that a party *must show a precise title.*"

1 Chitty on Pl., *503.

As to *color*, Chitty says:

"A special plea in trespass which claims for the defendant a *possessory* right, and yet does not give the plaintiff *express color*, is bad, because *it amounts to the general issue*, and violates the principle that a plea must *deny* or must *confess and avoid* the matter alleged in the declaration. A plea of *liberum tenementum* is free from this objection because it gives *apparent* color; as it is not absolutely and manifestly inconsistent therewith, that the plaintiff had some inferior *leasehold or minor title*, in respect whereof he might have had a *possessory* right or title, or at least possession. But a special plea disclosing a *possessory* title in the defendant, as a *leaseholder* or *termer*, is openly *at variance with*, and *directly contradicts*, the very gist of the plaintiff's action of trespass."

1 Chitty on Pl., *503, 504.

As to the necessity for *color*, see also Tyler's Stephen on Pl., 206 to 213.

Where in trespass *q. c. f.* the defendant pleaded that a third person was seized in fee and demised to the defendant for one year without giving *express color*, the court say:

"It is denied that the plea demurred to is a plea of *liberum tenementum.* It shows a freehold in Home; and only a *possessory right* in the defendant below; and, in such cases,

the plea, not giving *color* to the plaintiff, *amounts merely to the general issue.*

It is laid down by Chitty, that in trespass to lands, the plea of *liberum tenementum* gives *implied color.* * * * But when, from the nature of the defense, the plaintiff would have *no implied color* of action, the defendant cannot plead *specially* any matter which *controverts* what the plaintiff would, on the general issue, be bound to prove, without giving *express color.* Thus, in trespass to land, if the defendant plead a *possessory title* under a demise from a third person; this plea, *showing that the right of possession is in the defendant would, without giving express color, amount to the general issue.*"

Collet *vs.* Flinn, 5 Cowen (N. Y.), 467.

An Iowa statute provides for the removal of a case from a justice of the peace to the district court upon the defendant putting in a "*plea of title.*" Under this act "a plea of title" was put in and the case removed. At the trial in the district court the defendants offered to prove that they had a valid claim to the *locus in quo* at the time the alleged trespasses were committed, *and were then entitled to the possession thereof* by virtue of said claim, according to the laws of the land; which testimony was excluded on plaintiffs' objection. On appeal from a judgment for plaintiffs, the court above say:

"What is to be understood by the '*plea of title*' mentioned in the statute, and what kind of title can be relied upon in support of such plea? Evidently only such as may be legitimately pleaded specially, in contradistinction to the general issue. We know of no other plea of this nature but the plea of *liberum tenementum* or freehold. 1 Chitty, 541; Stephen on Pl., 314.

"And what, then, must be done by a defendant in such an action who wishes to protect himself by the fact that he had the *right of possession* to the *locus in quo* by a title *less* than freehold? *He must plead the general issue.* * * * It is a good defense under the plea of *not guilty* to show *a right of possession* in the defendant. * * * *Even a freehold title may be given in evidence under general issue,* but still *it* may be pleaded specially, *because it does not negative color of title*

in the plaintiff (Chitty & Stephen, *ut supra*); but the right of *immediate possession* cannot be *specially* pleaded, *as it would amount to the general issue.*"

Chester Sage & Co. *vs.* Keesecker, 1 Morris (Iowa), 447.

In the following cases it was held that a defendant cannot plead *a possessory title* without giving *color*, because such a plea *would amount to the general issue:*

Johnson *vs.* Hawson, 2 Manning & Ryland, *226 (17 E. C. L., 710).

Argent *vs.* Durant, 8 Durnford & East (8 Term Reports), *406.

"Every plea in justification states circumstances which either excuse the fact complained of or show it to be lawful. From its nature, therefore, *it must confess the fact*; otherwise it is no *justification*, but a *denial* of the fact, *and amounts to the general issue.*"

1 Saunders' Reports, 27, note 1.

These authorities show beyond all question that the plea in the case at bar, which is now under our consideration (Rec., p. 14), first, if intended as a special plea of any *possessory title* less than freehold, is altogether insufficient and fatally defective, because, as stated above, it fails to allege any *specific* title; it fails to allege the *derivation* or *commencement* of title and because it fails to give any *implied color* or any *express color* to the plaintiff; second, if intended as a plea of *liberum tenementum* it is also unquestionably defective and bad, because it merely alleges that the *locus in quo* was and is the "*close and soil* of the defendant" (Rec., p. 14), instead of alleging the same to be the "*close, soil, and freehold*" of the defendant. It nowhere pretends to set up a *freehold title* in the defendant, and, as we have shown above, *nothing short of a freehold title* is equivalent to *liberum tenementum.*

Moreover, though *liberum tenementum* might have been a

good plea to the cause in trespass *quare clausum fregit*, yet, even if properly and correctly pleaded, it would not, nor would any *possessory* plea or plea of *title* setting up right or title to the *close and soil*, be any defense to the counts in trespass *de bonis asportatis*. In the counts in trespass *quare clausum fregit*, the breaking and entering of the testator's close constitute the *gist* of the action; but in the counts in trespass *de bonis asportatis* the taking, carrying away, and conversion of the testator's goods and chattels constitute the *gist* of the action. In the *de bonis asportatis* counts, if the goods belonged to said testator it is of no consequence from whose close the defendant took them.

The plea under discussion is wholly inappropriate to the counts in *de bonis asportatis*, and leaves those counts unanswered. Being pleaded to the whole amended declaration, and being bad as to these counts thereof, it is bad on general demurrer.

McGillicuddy *vs.* Forsythe, 5 Blackf. (Ind.), 435, 436.
Rubottom *vs.* McClure, 4 *id.*, 510.
Hallett *vs.* Holmes, 18 Johnson (N. Y.), *28 to 30.
Nevins *vs.* Keeler, 6 Johnson (N. Y.), *64, 65.
Naglee *vs.* Ingersoll, 7 Pa. St., 205.
See also 1 Saunders' Reports, 28, note 3.

"In trespass *quare clausum fregit*, the defendant may give in evidence, under the *general issue*, any matter that contradicts the allegations which the plaintiff is bound to prove, or shows that the act complained of is not in its own nature a trespass. *Thus he may give in evidence soil and freehold in himself*, or in another by whose authority he entered, *or that he has any other right to the possession*."

Rawson *vs.* Morse, 4 Pick., 127.
Waterman on Trespass, 504.
Murray *vs.* Webster, 5 N. H., 391, 392.
Johnson *vs.* Hawson, 2 Manning & Ryland, 226 (17 E. C. L., 710).
Argent *vs.* Durrant, 8 Durnford & East (8 Term Reports) *406.

Under the plea of the *general issue* to the amended declaration the appellant could have offered any proof which he might have desired to introduce under said second additional plea (Rec., p. 14) to said amended declaration, and it necessarily follows that appellant was in no way injured or prejudiced by the action of the court below in ruling out that plea and sustaining the demurrer to the same (Rec., pp. 16, 62).

In Fant's case, *supra*, just as in this case, the object of the plea was to set up a defense that might have been made under the *general issue* which had been filed and issue joined thereon. The court held:—that the plaintiffs in error, *not having been deprived of any defense, had not been injured and could not complain.*

Fant *vs.* Miller & Mayhew, 17 Gratt. (Va.), 67.

And in Kemp's case, *supra*, the same court held that:—the court having done what was right, we cannot reverse its act because it has not done it in the right way, since the mode of doing it has no influence upon the justice of the case.

Kemp *vs.* Mundell, 9 Leigh (Va.), 16.

We respectfully submit that in the case at bar said ruling of the court was right, and that appellant has been in no way injured, ~~and that there is nothing in appellant's second assignment of errors (Appellant's Brief, p. 12).~~

IV.

PRECARIOUS USE AS CONTRADISTINGUISHED FROM PRESCRIPTIVE OR ADVERSE USE.

A right of way, public or private, is an easement or servitude—an incorporeal hereditament. "It lies not in livery, but in grant" (*Washburn on Easements*, *6, 4th ed., 6). "Highways are regarded as easements" (*Id.*, *159, 4th ed., 252).

"Anciently, prescription *implied* a claim to an incorporeal hereditament arising from the same having been enjoyed for so long a time that there was no existing evidence as to when such user and enjoyment commenced. Its origin must have been, in the quaint language of the law, at a time 'whereof the memory of man runneth not to the contrary.' At one time this was fixed at the commencement of the reign of Richard I."

In modern practice, however, a period of use and enjoyment is fixed at "a length of time answering to the period of limitation beyond which one dispossessed of lands is not at liberty to regain his seisin by making entry for that purpose" (*Id.*, *19, 65, 66; 4th ed., 32, 124, 125, 126).

The limitation of twenty years prescribed by the statute of 21 Jac. 1, ch. 21, for actions of ejectment, has *by analogy* been adopted in this jurisdiction and in those States where other provision is not made in the local statutes of the State (*Id.*, *66; 4th ed., 126).

"Prescription was open to be *rebutted* by proof that the use did begin within the period of memory. It might always be *rebutted* by showing by testimony when the enjoyment of the right claimed had its origin or beginning."

Id., *19, 65; 4th ed., 32, 124.

It is unnecessary to discuss the question or to go into the question of whether on theory or principle such prescriptive

use or long adverse use of a road as a public road is considered as raising a presumption of a lost grant or a presumption of due and rightful anterior acquisition or creation of the highway whereof the evidence is lost, for what we have to say is as applicable to the one theory as to the other theory.

"The period of twenty years has been adopted by the courts in *analogy* to the statute limiting an entry into lands; but as the statute does not apply to *incorporeal rights*, the adverse use *is not regarded as a legal bar*, but only a ground for *presuming* a right by grant or in some other form."

Washburn on Easements, * p. 72; 4th ed., 134.

PLAINTIFFS' 2D PRAYER instructs the jury, in considering the evidence with reference to the issue joined upon defendant's plea of common and public highway, that "long use never ripens into such a right of way or easement unless it be an adverse, uninterrupted enjoyment of such use under a claim of right for the full period of 20 years." It further instructs the jury that "if the user is by *permission, leave, license, or indulgence* of the party over whose lands such use is enjoyed, *or can*, in view of all the evidence, be placed upon *any other footing* than a claim or assertion *of right*, it *will repel* any presumption of a grant, and *will be* what is called a *precarious* use, and such a *precarious* use never ripens into an *adverse* use, no matter how long it continues" (Rec., p. 31, & p. 40).

Appellant's attorneys say this instruction should have read "*and can, in view*," &c., instead of "*or can, in view*," &c. They also say the jury should have been instructed that the conditions set out in said prayer "*may repel*," &c., instead of "*will repel*," &c. ~~(Appellant's Brief, p. 20).~~

Appellant is wrong as to these and as to all objections to said prayer. Both upon principle and authority, it correctly states the law.

In the first place, issue was joined (Rec., p. 16) upon de-

fendant's plea of common and public highway (Rec., pp. 153, 154). The *affirmative* of this issue and *burden of proof* under it rested, therefore, upon the defendant.

The rule is "*that the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue.*" (1 Greenleaf on Ev., 14 ed., § 74, p. 104, and cases there cited.)

"The *burden of proof* and the weight of evidence are too very different things. The *former* remains on the party *affirming a fact* in support of his case, *and does not change in any aspect of the cause.*"

Central Bridge Corporation *vs.* Butler, 2 Gray, 132.
Powers *vs.* Russell, 13 Pick., 76.
Caldwell *vs.* New Jersey Steamboat Co., 47 New York, 290.
Spaulding *vs.* Hood, 8 Cush., 606.
1 Greenleaf on Ev., 14th ed., § 74, p. 104, note *a*.

In other words, it was incumbent upon the defendant to prove its plea of common and public highway—to prove everything that was necessary to establish and maintain that plea.

In the second place, coming to the question of user, to which plaintiffs' second prayer particularly relates, the authorities are clear that the party who relies upon and claims under such user to prove a right of way or easement must make out, not the mere user *alone*, but *each and every essential quality and ingredient* necessary to thereby establish such right of way or easement.

"The *burden of proof* is always on the one claiming an easement by adverse enjoyment, not only to show the enjoyment, but that it was adverse under a claim of title and known to the owner, and that it has been uninterrupted; all of which must be affirmatively shown."

Washburn on Easements, *p. 86, 4th ed., p. 151.

The court of appeals of Maryland say:

"In order to establish the right to the way by user, the evidence should show that the use and enjoyment of the

way had been *continuous and uninterrupted* for at least twenty years before the obstruction complained of; and that such user was *adverse*, that is, *under a claim of right*, with the knowledge and acquiescence of the owner of the land; and the *burden of proof is on the party claiming the easement.*"

Oliver *vs.* Hook, 47 Md., 311.

S. P., American Co. *vs.* Bradford, 27 Cal., 368.

"The *mere user* of a road by the *public*, for however long a time, will not constitute it a *public road.*"

Comm. *vs.* Kelly, 8 Gratt. (Va.), 632.

Speaking for the court, Hopkins, J., says:

"I think such user (20 years' user) in order to constitute a prescription, or dedication by prescription from acquiescence in such user, must have been *adverse* under some real or pretended *claim or right*, and it must have been *exclusive.* In the absence of proof to the contrary, *I think the presumption is* that the user was *permissive* and *not adverse.*"

Nelson *vs.* City of Madison, 3 Bissell C. Ct., 253.

The courts of New York and Massachusetts each said:

"*The essential ingredients were to be made out by the owners of the estate claiming the service.* They must not only prove the *using for* 20 *years*, but that it was *continued, uninterrupted and adverse*—that is, *under a claim of right*, with the acquiescence and knowledge of the owner."

Colvin *vs.* Barnett, 17 Wend. (N. Y.), 568.

Sargent *vs.* Ballard, 9 Pick. (Mass.), 255.

"*It is incumbent upon the party who claims it (easement) to prove* that the use was *adverse, uninterrupted*, and with the knowledge and acquiescence of the owner of the land; and *each of these qualities or ingredients* ESSENTIAL *to the maintenance of the claim* is open to contradiction and liable to be disproved."

Smith *vs.* Miller, 11 Gray (Mass.), 149.

It is well settled that if the use *commences* as a mere *precarious* use, it is considered that it *continues* as such until

the party enjoying such use *does some act clearly and unequivocally indicating* to the owner of the soil that the use is being exercised or enjoyed *adversely* to such owner; and the period of prescription will not even *begin* to run till some such unequivocal adverse act is brought home to the knowledge of the owner of the soil.

In the case last cited the court *held* that the use having *commenced without claim of right* "must be considered to have been *afterwards permissive* and in accordance with the original agreement of the parties, UNTIL *the plaintiff asserted some claim or exercised some right* indicating that he made or intended to assert a claim *adverse* to the right of the defendant or of his predecessors."

Smith *vs.* Miller, 11 Gray (Mass.), 149.

So, too, Mr. Washburn says:

"If the parol agreement amounts merely to a *license* or *permission* to use the easement, *the period of prescription does not begin to run till the licensee does some act which unequivocally shows that he abandons his license* and is using the easement *adversely*."

Washburn on Easements, 4th ed., p. 154, * p. 89.

In a Connecticut case the court say:

"Title by prescription can only be acquired by an *adverse, exclusive, uninterrupted use* sufficiently long-continued (in this State for 20 years) *under a claim of title*, and with the knowledge and acquiescence of the owner of the land. It must be *under a claim of legal right*, and *not by consent, permission, or indulgence*, and THESE FACTS MUST BE PROVED BY THE PARTY CLAIMING THE EASEMENT. * * * The user having *commenced* under Ladd's *license*, if the defendants and their grantors would have had their user adverse, *they should have done some unequivocal act showing such intention.*"

Taylor *vs.* Gerrish, 59 Conn., 571.

A paid B $7.00 for permitting A to drain through B's premises, built the drain at his (A's) expense, and used it for

more than 20 years. After it had been so used by A for more than 20 years, B cut it off. B's receipt for the $7.00 stated it was for such privilege of drainage.

The court say:

"The receipt contains a mere *license* or *permission* to drain, and no agreement to convey an easement. * * * It was, therefore, revocable. * * * His (plaintiff's) expenditures were trifling, and for aught that appears, have been more than repaid in the use already had by the plaintiff of the privilege given him. * * * Nor does the fact of payment for the license alter the defendant's right. His permission to drain was still a mere *license*, and none the less revocable that it was paid for.

"It is also contended, on behalf of the plaintiff, that * * * he has a prescriptive right to the easement. * * * The acts of possession *commenced by permission*, &c. * * * It follows that there could be *no adverse* possession until after July, 1876, when the defendant did the thing complained of, and cutting the plaintiff's sewer, forbade his entrance upon the premises. *Up to that time, possession under the license or permission of the defendant prevented it from being adverse.*"

Wiseman *vs.* Luckinger, 84 New York, 42 to 44.

In a Texas case the court of civil appeals, in 1892, say:

"We do not concur in the holding that the public had acquired an easement by prescription. As a general rule, before a highway can be established by prescription, it must appear that the general public, *under a claim of right*, and not by mere *permission* of the owner, used some defined way, *without interruption or substantial change, for at least the longest period of limitation prescribed by statute against an action for the land*, and many authorities hold that such use must be for at least twenty years. Where the use is merely *permissive* and *not adverse*, THERE IS NO BASIS ON WHICH A RIGHT OF WAY BY PRESCRIPTION CAN REST. * * * Applying these tests to the case before us, we find that at least one *essential element* of a right founded upon prescription is wanting. It was not shown that the county, or any one acting for it or for the public, ever asserted a right to the use of the land in question for a public road, *adverse* to the title and rights of the appellant, *until* August,

1878. *Up to that time the use of the route traveled by the public as a public highway appears to have been merely* PERMISSIVE, *and* NOT ANTAGONISTIC *to the rights of appellants.*"

Cunningham *vs.* San Saba Co., 20 S. W. Rep., 942.

In the third place: Even 20 years' exclusive and adverse use and enjoyment is not conclusive evidence of the right. In a Virginia case the trial court was asked and refused to instruct the jury that "if it was proved to their satisfaction that the defendant and those under whom he claimed had been for more than 20 years in the *exclusive and adverse* possession and exercise of the right of raising the water in Naked creek to the height at which it stood when the grievance complained of was inflicted, such *exclusive and adversary* enjoyment and use must be taken by them as *conclusive evidence* of the right of the defendant to raise the water to that height." The court of appeals of Virginia, Carr, J., say:

"The court refused to give this instruction, and I think very properly. * * * There is a great difference between *length of time* which operates as a *bar* to a claim, and that which is only used *by way of evidence.* A jury is *concluded* by length of time that operates as a *bar:* as where the *statute of limitations* is pleaded in bar of a debt; though the jury is satisfied that the debt is due and unpaid, it is still a bar. But length of time used merely by way of evidence, may be left to the consideration of the jury, to be credited or not, and to draw their inference one way or the other according to the circumstances."

Nichols *vs.* Aylor, 7 Leigh (Va.), 558.

S. P., The Mayor of Hull *vs.* Horner, 1 Cowper, 108, 109—Lord Mansfield.

So, even where exclusive, uninterrupted, open, and adverse use and enjoyment of a road under a claim of right for the required length of time is proved without any explanatory, qualifying, or rebutting circumstances, still it is not conclusive as the statute of limitations would be, and

does not justify the court in taking the question from the jury; but, on the contrary, *is mere evidence for the jury*, and must be left to the jury to make the presumption or not, as they see fit.

In an action of trespass *q. c. f.*, where the defendant claimed title by adverse possession, the jury were instructed that if the defendant was in uninterrupted adverse possession of the land for 20 years or more before the alleged trespass, claiming title thereto, the jury were *authorized* to presume that he had a legal grant thereof or other valid title; "*but that the jury were not bound by law to make such presumption*," held "that the plaintiff had no ground of exception."

Stevens *vs.* Taft, 11 Gray (Mass.), 33, 34.

In the following cases the court say:

"I do not dispute that if there had been an uninterrupted usage for 20 years, the jury *might be authorized* to presume it originated in a deed; but, *even in such a case a judge would not be justified* in telling a jury that they *must*, but that they *may*, presume a deed."

Livett *vs.* Wilson, 3 Bing., *118; 11 E. C. L., 66.
Nichols *vs.* Aylor, 7 Leigh (Va.), 561.
Smith *vs.* Miller, 11 Gray (Mass.), 148.

A fortiori, where there are explanatory, qualifying, or rebutting circumstances, the jury is entitled to consider them and to decide accordingly.

Livett *vs.* Wilson, 3 Bing., *118; 11 E. C. L., 66.
Nichols *vs.* Aylor, 7 Leigh (Va.), 561.
Smith *vs.* Miller, 11 Gray (Mass.), 148.

Fourthly. The District of Columbia having the burden of proof resting upon it and having to establish, not merely user by the public for the required length of time, but every essential element, quality, and ingredient showing such user to be adverse and under a claim of right, is bound, in order

to prove its plea by this kind of evidence, to satisfy the jury that such user cannot be placed upon any other footing than a claim or assertion of right; otherwise the District fails to maintain its plea.

"If one use a way by *permission* it could not ripen into a *right*. The use must be *adverse*, and *such as would show that no one could dispute the exercise of it*."

Golding *vs.* Williams, Dudley (So. Ca.), 94.
Washburn on Easements, * p. 89; 4th ed., 155.

"When a *loan is proved*, how can we *presume a grant?*"

Nichols *vs.* Aylor, 7 Leigh (Va.), 558.

If, therefore, the proof shows that the use and enjoyment were by permission, comity, license, indulgence, favor, or toleration, or can be placed upon any other footing than a claim or assertion of right, then such proof will not maintain said plea of common and public highway, because such proof unquestionably repels any presumption of a grant, and establishes what is called a precarious use, which never ripens into an adverse use, no matter how long continued.

"To establish a highway by prescription, there must be *an actual public use, general, uninterrupted, continued* for the period of the statute of limitations *under claim of right*. * * * Unless the use and occupation are attended with circumstances, or are in themselves of such a character *as to evidence a claim of right*, no title by prescription *can be acquired*."

The State *vs.* Green, 41 Iowa, 695.

So in an English case the court say:

"We hold, that under a plea denying that the defendant had used the way for 40 years, *as of right* and *without interruption*, the plaintiff is at liberty to show the *character and description* of the user, and enjoyment of the way *during any part of the time;* as that it was used by stealth, * * * or that it was merely a *precarious* enjoyment by leave and

license, OR ANY OTHER CIRCUMSTANCES WHICH NEGATIVE THAT IT IS AN USER OR ENJOYMENT UNDER A CLAIM OF RIGHT."

Beasley *vs.* Clarke, 2 Bing., N. C., 709; 29 E. C. L., 728.

"The real point of distinction is between a *tolerated* or *permissive* user, and one which is *adverse* or as of right. *The former will not mature* into a title by prescription."

Washburn on Easement, * p. 86; 4th ed., p. 152.
Polly *vs.* McCall, 37 Ala., 29.

In 1882 the court of appeals of Maryland said:

"In the absence of an express grant, it was necessary for the plaintiffs to prove an *adverse, exclusive, and uninterrupted enjoyment* of the right of way in question for 20 years. By *adverse* is meant a user, *without license or permission*, for an *adverse* right of an easement cannot grow out of a mere *permissive* enjoyment, the real point of distinction being between a *permissive or tolerated* user and *one which is claimed as a matter of right.*"

Cox *vs.* Forrest, 60 Md., 79.

"In order to have a use or occupation accomplish this (prescription), it must have been *adverse* to the owner. It must have also been an *exclusive* use by the public. It must also have been *acquiesced in* by the owner, and *not contested or denied.*"

Nelson *vs.* City of Madison, 3 Bissell C. Ct., 255.

"To establish a right to an easement by prescription, it must be shown not only that it has been enjoyed uninterruptedly the requisite length of time, but that the user was *adverse, and not merely permissive.*"

Pentland *vs.* Keep, 41 Wis., 501.

"Before a highway can be thus (prescriptively) established, it must appear that the general public, *under a claim of right*, and *not by mere permission* of the owner, used some defined way, *without interruption or substantial change*, for a period of 20 years or more."

Shellhouse *vs.* The State, 110 Ind., 511, 512.

"A single lisp of acknowledgment that one claims no title, fastens a character upon his possession which makes it unavailable for ages."

Calvin *vs.* Burnett, 17 Wend. (N. Y.), 569.
Washburn on Easements, * p. 87; 4th ed., 153.

"When the use is interrupted, prescription is annihilated, and must begin again."

Shellhouse *vs.* The State, 110 Ind., 512, 513.

The court of appeals of Virginia say:

"*This presumption* of a grant after 20 years' exclusive and adverse possession and enjoyment of the way CAN ONLY APPLY TO CASES IN WHICH THE POSSESSION CAN IN NO OTHER WAY BE ACCOUNTED FOR, than by a grant from the plaintiff or those under whom he claims. WHERE THAT IS NOT THE CASE, THE PRESUMPTION MUST FAIL."

Nichols *vs.* Aylor, 7 Leigh (Va.), 564.

In the leading case in Maryland the bill alleges that "the complainant and those under whom he claims, have, together, *for greatly over* 20 *years, and for probably* 100 *years or more*, had the full, uninterrupted, and complete use and enjoyment of a road from their farm over a parcel of land now occupied and owned by the defendant." Chancellor Johnson in deciding against the existence of this alleged right of way, says:

"A user for 20 years exercised *adversely and without anything to qualify it*, will afford sufficient ground for the *presumption* of a grant, but if the enjoyment CAN BE REFERRED to the leave or favor of the party over whose lands the right of way is claimed, OR CAN BE PLACED UPON ANY OTHER FOOTING *than a claim or assertion of right*, IT WILL REPEL THE PRESUMPTION OF A GRANT."

Pue *vs.* Pue, 4 Md. Ch'cy, 387.

It is respectfully submitted that plaintiffs' 2d prayer (Rec., pp. 39, 40) is correct and proper; that appellant's objections

to the same are groundless, ~~and that there is nothing in appellant's 3d assignment of errors.~~

Defendant's third prayer, as asked, instructs the jury that if they believe the road in controversy was a public county road, openly, notoriously, and uninterruptedly used and recognized by the public for more than twenty years, under the control of and repaired by the public authorities under a claim of right, they ought to presume a grant of a right of way to the public over said road, and it concludes with these words [and the plaintiffs are not entitled to recover in this action and the verdict should be for the defendant] (Rec., p. 44). This bracketed language, which was struck out by the court (Rec., p. 44), certainly vitiated the prayer, as asked, and consequently was properly struck out of it. This language vitiated it for the following, among other, reasons, viz:

First. Because, even if they believed said road to be such a common and public highway and presumed a grant of it to the public, yet the uncontradicted testimony showed that down to and at the time of the trespass it was not over twenty-five feet in width, while the excavation and trench through testator's close were at least thirty-three feet in width; and so the plaintiffs, even in that event, would unquestionably have been entitled to recover something on account of what was done in such extra eight feet.

Second. Because, even if they could have believed said road to be such a common and public highway of the width of 33 feet, and presumed a grant of it to the public of the width of 33 feet, yet the evidence showed that there was no exercise of the power to grade that particular road, and that the making of the excavation and trench through testator's close and the removal of the gravel therefrom *were not for the purpose of* or *in exercise of any power to* grade or improve

that particular road, but *solely* for the purpose of graveling *another distant and distinct road*, and that the getting of said gravel and digging of said excavation and trench were *not incident* to the exercise of any power to grade or improve the said road in controversy through testator's close. In case the jury believed these additional facts, the plaintiffs would have been entitled to recover, even though the road in controversy was a common and public highway of the full width of 33 feet.

Further on we will discuss at greater length, in another connection, these two questions—*width* and *purpose*—but in the present connection it is enough to say that the bracketed words above mentioned (Rec., p. 44) were fatal to said prayer, as asked, and were properly struck out of it by the court (Rec., pp. 44, 45).

For the first reason above mentioned the italicized words "*to the width it had been so used*" (Rec., p. 44) were properly added by the court at the end of said prayer. But for this addition the jury might have been confused and misled by the prayer, and might have supposed the existence of such public road through testator's close would constitute a good defense, irrespective of and without inquiring into its width.

The words "*and adversely to the plaintiff's testator and those under whom he claimed*" (Rec., p. 46) were also properly added by the court. They certainly do not vitiate said prayer in the least. The use must be *adverse* or it will never ripen into a right of way or easement. The authorities already cited are conclusive on this point. This insertion in no way vitiated said prayer. The words "*under a claim of right*" were in the prayer as asked, and were left in it by the court (Rec., pp. 44, 45), and they embody the same idea as the court's said insertion. This insertion, therefore, in no way prejudiced or injured appellant. So far as said prayer is concerned, appellant has no ground of complaint because of its refusal as asked or because of such modifications or any of them by the court.

Said prayer certainly does not err *against appellant*, though it probably went too far *in favor of appellant*, in this: As asked and as granted, it instructs the jury that upon the conditions set out in said prayer the jury may "*and ought to*" presume a grant of a right of way to the public, &c. (Rec., p. 44).

"A judge would not be justified in telling a jury that they *must*, but that they *may*, presume a deed."

Livett *vs.* Wilson, 3 Bing., *118; 11 E. C. L., 66.
Nichols *vs.* Aylor, 7 Leigh (Va.), 561.
Smith *vs.* Miller, 11 Gray (Mass.), 148.
Stevens *vs.* Taft, *id.*, 33, 34.

In the case at bar the record contains on behalf of appellees explanatory, qualifying, and rebutting facts and circumstances of the most unambiguous and conclusive character, indicative of *precarious* use as contradistinguished from *adverse* use, such as the owner maintaining gates across it from 1842 to May 15, 1857 (Rec., p. 22), and the gate-posts till some time in 1861 (Rec., p. 22); building a wall in said road (Rec., p. 22); changing its location by the owner's own employés, at his own expense, for his own reasons, and because of his own wishes (Rec., p. 21); owner's preventing its repair by public authorities after 1865 when he saw fit, and making them undo what they had done if he objected to it (Rec., pp. 23, 24, 25); its not having been repaired or recognized by the public authorities prior to the close of the war, prior to 1865 (Rec., pp. 23, 26), its precarious origin (Rec., pp. 21, 22), the assessment and payment of taxes upon it as private property (Rec., pp. 25, 22), and the owner's exercise of other acts of ownership over it (Rec., p. 22). With such evidence before the court and jury, should not the words "*and ought to*," to which we referred above, have been omitted from defendant's third prayer?

~~We submit that there is nothing in appellant's thirteenth assignment of errors.~~

DEFENDANT'S FIFTH PRAYER instructs the jury that if they believe from the evidence that the public used Harewood road as a public highway whenever it saw fit, without [asking] leave *of the owner* and without objection *from him*, this is adverse, and uninterrupted adverse enjoyment for twenty years constitutes a title which cannot afterwards be disputed. Such enjoyment, without evidence to explain how it began, is presumed to be in pursuance of a full and unqualified grant (Rec., p. 45). The bracketed word "asking" was struck out by the court, and the italicized words "*of the owner*" and "*from him*" were inserted by the court (see Rec., pp. 44, 45). Said italicized insertions were certainly proper and certainly do not vitiate said instruction. No one will or can pretend for a moment that the use of a road without leave *of a third party or stranger* and without objection *from such third party or stranger* would be adverse. If these inserted words were not implied in said prayer as asked, then it was unquestionably bad because of their omission. On the other hand, if they were implied in the prayer as asked, then their insertion did not change its meaning or effect. The court certainly was right in striking out the bracketed word "asking" in said prayer. It would be monstrous to hold that whenever one goes over another's land he is using it *adversely*, unless he takes the trouble to hunt up the owner and *actually ask* his permission. There are numerous cases in which one's use of a road over or privilege in another's land is held to be *precarious* and *not adverse*, though he never in fact went through the form of actually *asking* the owner's leave (O'Neal *vs.* Blodgett, 53 Vt., 217).

"An enjoyment of a thing may be continued long enough in respect to time, and yet *under such circumstances as to rebut* the idea of its being an adverse, *though not permissive*, user."

Washburn on Easements, * p. 89, 92; 4th ed., 155, 159.

This prayer, even as modified, was not only too favorable to appellant, but was also prejudicial to appellees. Where the use is by *comity, indulgence, or toleration* or *can be placed upon any other footing than a claim or assertion of right*, it will not be an adverse use, but a precarious use, although frequently in such cases it might be, strictly speaking, used *without leave*. In short, proof that the use is *by leave* is one way of showing that the use is not adverse, but it is not the only way. Thus in a South Carolina case the court say:

"The manner in which this millway had been used, did not indicate that any one claimed a *right* in it. * * * It was like many ways, &c., used for *convenience*, without any *assertion or supposition of right*."

Golding *vs.* Williams, Dudley (So. Ca.), 95.

Said prayer also went too far in favor of appellant in instructing the jury that twenty years' uninterrupted adverse enjoyment constitutes a title *which cannot afterwards be disputed* (Rec., p. 45) It may be afterwards lost by twenty years' subsequent abandonment or it may be instantly lost by an express act of abandonment. The court of appeals of Maryland say:

"If therefore the adversary user of a right of way over the lands of another for twenty years shall be a sufficient foundation to presume that the right originated in grant, it must follow, upon every principle, that (by) the (like) non-user of the right (it) may be extinguished, by presuming a release of it."

Wright *vs.* Freeman, 5 H. & J. (Md.), 477.

It is a familiar and well-settled principle of law that "upon the discontinuance or abandonment of the right of way, the entire and exclusive property and right of enjoyment *revest* in the proprietor of the soil" (Washburn on Easements, * p. 159; 4th ed., 253). Said prayer was also too favorable to appellant, and erred against appellees in instructing the jury that such enjoyment, without evidence to explain *how it began*,

is presumed to be in pursuance of a full and unqualified grant (Rec., p. 45). Evidence of its subsequent use and enjoyment—subsequent continuance—may as thoroughly and effectually rebut and refute any presumption of its being in pursuance of a full and unqualified grant as evidence explaining how it began might do.

In these respects said prayer, as asked and as modified, erred against appellees and was prejudicial to them, but was far too favorable to the defendant and in no way injured appellant. ~~There is, consequently, nothing in appellant's fourteenth assignment of errors.~~

DEFENDANT'S SIXTH PRAYER, as asked and as modified, is set forth in the record as follows:

"The jury are instructed that it will be sufficient ground for the presumption of a grant of Harewood road to the public as a highway for the defendant to show that such a grant might have issued, and if that appears from the evidence, then [in the absence of], *if there be no facts or* circumstances *proven by the evidence* repelling such conclusion, the jury may assume also that all that might lawfully have been done to perfect the title of the public *to the road to the width it was actually so used for twenty years* was in fact done and in the form prescribed by law" (Rec., p. 45).

The court's modification of this prayer consisted in striking out the bracketed words and in inserting the italicized words (Rec., pp. 44, 45).

The court's insertion into said prayer of the words "*to the road to the width it was actually so used for twenty years*," as shown above, was certainly proper and in no way vitiated said prayer. Except for the insertion of this language, the prayer was undoubtedly calculated to confuse and mislead the jury. Had this prayer been granted, *as asked*, the jury would naturally have supposed and concluded from it that the width of the road was of no consequence, and in all probability would have lost sight of the important fact that

by uncontradicted and undisputed testimony the road in controversy was not over 25 feet wide and the excavation or trench made through testator's close was not less than 33 feet wide. It was certainly proper that this question of the *width* of road should not be obscured or concealed, but should be called to the attention of the jury. The court's remaining modifications of defendant's sixth prayer were wholly immaterial and worked no change in its meaning or effect.

This prayer, however, both as asked and as modified, was far too favorable to appellant and too prejudicial to appellees.

1st. Because it in effect instructs the jury that it will be sufficient ground for presuming a grant, that such a grant *might have issued* (Rec., p. 45). We submit that such a proposition is not good law. The jury are not to guess wildly or capriciously, without regard to the evidence. The Supreme Court, in speaking of such presumptions, say :

"They are founded upon the consideration, that the facts are such as could not, according to the ordinary course of human affairs, occur, *unless there was a transmutation of title to*, or *an admission of an existing adverse title in*, the party in possession. They may, therefore, be encountered and rebutted by contrary presumptions; AND CAN NEVER FAIRLY ARISE WHERE ALL THE CIRCUMSTANCES ARE PERFECTLY CONSISTENT WITH THE NON-EXISTENCE OF A GRANT: *A fortiori*, they cannot arise where the claim is of such a nature as is *at variance with the supposition of a grant.*"

Ricard *vs.* Williams, 7 Wheaton, 109, 110.
Washburn on Easements, * p. 67; 4th ed., p. 127.

In short, a grant is presumed not because it appears that a grant might have issued, but because the supposition of a lost grant satisfactorily accounts for, explains, reconciles, and harmonizes the evidence, and because the evidence in the case would be inconsistent with the non-existence of such grant.

Second. Said prayer, continuing, goes on to say, "and if *that* appears from the evidence, *then*, &c." (Rec., p. 45). To what does the word *that* refer or relate back to, as used in this sentence? It unquestionably refers back to the phrase "*a grant might have issued*," as contradistinguished from the expression "*a grant did issue;*" so that the effect of the prayer as asked is the same as if the latter part of it had read, "and if it appears from the evidence that a grant *might have issued*, then, in the absence of circumstances repelling such conclusion, the jury *may assume also* that all that *might* lawfully have been done to perfect the title of the public was in fact done and in the form prescribed by law." (See Rec., p. 45.) The use of the word *might* throughout this prayer, both where it is expressly used and by relation back of the word *that* it is impliedly used, does not help said prayer in the least.

The jury were invited to indulge *ad libitum* in presumptions and assumptions based on mere speculation and guesswork; but, passing that by, we call your attention to the fact that, although *it was only in the absence of repelling circumstances* that the jury were told they might assume the public's title to have been lawfully perfected, yet the first part of said prayer, *without regard to the absence or presence of repelling circumstances or allusion thereto*, instructed the jury it was sufficient ground for *presuming* a grant that such a grant *might have issued*. In the light of the authorities, we submit that, to say the very least, this should have been limited and restricted to a case where there were no explanatory, qualifying, or rebutting circumstances.

Said prayer, as asked and as modified, erred against appellees and was prejudicial to them, but was far too favorable to the defendant and in no way injured appellant. ~~There is consequently nothing in appellant's 15th assignment of errors.~~

V.

DEDICATION AND ITS ESSENTIAL ELEMENTS—INTENT, OVERT ACT, AND ACCEPTANCE—EACH OF WHICH MAY BE EXPLAINED, QUALIFIED, OR REBUTTED.

Before discussing the prayers based on the question of dedication, let us see what the evidence is on which appellant must rely, and let us consider whether the court below was justified in submitting the question of dedication to the jury at all. We think not. It cannot be seriously contended for a moment that there was any evidence whatsoever of express dedication. Can it be said that there was any *implied* dedication? Could the jury upon such evidence as was before them *imply* a dedication? This is the question the affirmative of which appellant must maintain, and to determine it we will examine the evidence and then examine the law applicable to the same. User of the road, planting of some levy court stones, and repair of the road, are the matters—the only matters—upon which appellant must rely to establish such dedication, so far as we are aware. Are they sufficient to make out a case of this so-called *implied* dedication, even if unexplained, unqualified, and unrebutted? If so, were they so explained, qualified, and rebutted as to form no basis for dedication and to make it the duty of the court below to instruct the jury that they must find against dedication?

First. As to *user*, the record says appellant gave evidence tending to show—

"That Harewood road through the lands of plaintiffs' testator had been continuously *used* by the public from 1848 down to the time of the alleged trespasses (Rec., p. 32); that appellant's witness, *Tobias Talbott*, testified 'that such public *use* of the road consisted of its use by all manner of people

at their will and pleasure by day and night passing along and over the road on foot, with horses and cattle, and in wagons or other vehicles, and *while this use prior to* 1861 *was more or less confined to people living on farms in the neighborhood*, it had much *increased of late years*, and especially *since the late war*, when it was *used by soldiers* and by the general public as a thoroughfare; that, *except in this increased use* of the road, there had been no material change in it" (Rec., p. 33). That appellant's witnesss, J. Enos Ray, testified "that the *use* of the road by the public was simply the passing over it—going to and fro—as people would on any other highway, and was simply the use of the surface" (Rec., p. 34). That appellant's witness, James Johnson, gave evidence "tending to show that he had known what is now called Harewood road since 1835; *that everybody living along the road used it* as they did all other county roads; *that in* 1835 *there were only two or three farms along the line of the road, and the people from those farms used to travel what is now Harewood road* (Rec., p. 34); they not only used to travel it on foot, but with their wagons, horses, and cattle; that witness knew Mr. Agg, and that objection was never made by him or by Mr. Robinson, plaintiffs' testator, while he lived *to such use* of Harewood road; that Harewood road, as it is now called, was used by people to get to Rock Creek church, and it connected with what was called the Rock Creek Church road; that while there were other roads leading to Rock Creek church, such as Bates road and the old Bladensburg road, whereby people could go to said church without using Harewood road, there were some places from which they could not have reached the church except by going a greater way around, unless they used Harewood road; that this road went up a very high hill, and it was an inconvenient road to travel" (Rec., p. 35). That appellant's witness, John W. Ray, gave evidence "tending to show that as a boy (about 1858), some 40

years ago, he used to *travel* what is now Harewood road daily, tending his father's cattle" (Rec., p. 35). That appellant's witness, Theodore Sheckels, gave evidence "tending to show that he had known Harewood road since 1848, at which time he says it appeared to be a public road, to all intents and purposes" (Rec., pp. 36, 43). That appellant's witness, George N. Beale, gave evidence "tending to show that he had known Harewood road (about 1843) some 55 years ago, having been then (in 1843) taken along that road to Rock Creek church to be christened, and that it had been considered a county road, a public road, ever since witness knew it" (Rec., pp. 37, 36).

Such is appellant's evidence as to user.

Second. As to the *levy court stones*, the record says that appellant's witness, J. Enos Ray, testified "that boundary stones were planted at the angles of Harewood road, under the authority of the late levy court, in 1867 or 1868; that some of those stones are to be found in place to this day; that Mr. B. D. Carpenter, who was then county surveyor, and his son-in-law, Mr. Martin, planted those stones" (Rec., p. 34); and that appellant's witness, George N. Beale, gave evidence tending to show "that the levy court stones along Harewood road were placed there by the late B. D. Carpenter while Samuel P. Brown was president of the levy court" (Rec., p. 37).

Such is appellant's evidence as to these levy court stones.

Third. As to *repairs*, appellant's witness, James Johnson, testifies:

"Witness has seen repairs done on Harewood road, *but does not recollect exactly who done them or when.* * * * Witness was a policeman from 1861 to 1871, and during that time made reports to the levy court of Harewood road from time to time when it was out of repair, and the levy court, upon receipt of such reports, would send employés and workmen to repair it, and in doing such work holes and bad places

in the road were filled up. * * * The District of Columbia also repaired said road; *witness cannot remember when, though, at all*" (Rec., p. 35).

The old levy court did not cease to exist till June 1, 1871. The act of Congress of 1871 declares:

"The levy court of the District of Columbia and all offices connected therewith shall be abolished on and after said 1st day of June, A. D. 1871" (16 Stat. L., p. 428).

A witness who admits, as Johnson does, that he don't recollect "*who done them or when*," and who admits he can't remember "*when, though, at all*" (to use Johnson's own expressions), can't be said to furnish satisfactory evidence of repairs *before said war*. This is all we think it important to observe about Johnson. He probably saw some repairs after the war, between 1865 and 1871. He traveled the road as a policeman during that time. According to his own testimony, he was *not a policeman before the war*. Appellant's witness, J. Enos Ray, testifies that he, as supervisor, and Middleton, as superintendent of roads, were appointed by the levy court in 1869, and held office till the levy court was legislated out of existence, in 1871 (Rec., p. 34).

He testifies "that the repairs on the Harewood road during that time—*i. e.*, 1869 to 1871—were the ordinary repairs to a public highway" (Rec., p. 34). So far as he and Middleton, his superior officer, are concerned, his testimony does not tend in the least to prove any repairs by them *before the war*, because they only held office from 1869 to 1871, *after the war*, as he himself testifies.

This witness, J. Enos Ray, says, however, "that before the late war *old man Enos Ray*, as supervisor of county roads, performed work on Harewood road and repaired it as other public roads were repaired and kept in order; that the cost of repairs upon Harewood road by the *said Enos Ray* were paid for at different times, as the work was done by said levy

court" (Rec., p. 34). He does not say how long or short a time before the war repairs were made, nor does he pretend to say that *old man Enos Ray* (his father), ever repaired *that part* of Harewood road running through the tract in question—the Agg or Robinson tract, called the "Vineyard." The road extended a long distance on either side of said tract (Rec., p. 21). This witness resided some distance from the road in question. He does not say he ever *saw* his father repairing it, or where his father repaired it, or how he got his information, and looking merely at his evidence, its vagueness and generality certainly leave the mind in doubt as to his father ever having repaired the particular part of Harewood road which was within the limits of the Agg or Robinson tract, if he repaired that road at all. On the other hand, appellant's witness, Tobias Talbott, testifies as follows upon this subject:

"That old man Enos Ray, now deceased, who said Talbott knew very well, was the supervisor of county roads in the District of Columbia *from* 1840 *down to the time of the late war*. The said Talbott (who *in those times* worked for Mr. George W. Riggs and *lived* west of John Agg, *upon the adjoining place, which was then owned by George W. Riggs* and now being the National cemetery and Soldiers' Home grounds) DON'T RECOLLECT THAT HE EVER SAW OLD MAN ENOS RAY WORKING THIS ROAD; that it was before the late war and while said Mr. Ray was supervisor that the plaintiffs' testator came to live upon what formerly was known as the Agg tract, now the Robinson tract, being the premises through which Harewood road runs" (Rec., pp. 33, 34).

In all this long period of 21 years, from 1840 to the commencement of our civil war, in 1861, defendant's witness, Talbott, living on the adjoining place, through which this Harewood road also ran, *never saw old man Enos Ray working Harewood road.* It seems to us that Talbott's evidence quoted *supra* is convincing that the road in controversy was not worked or repaired by old man Enos Ray before

our civil war. Appellant's witness, Theodore Sheckels, says: "Years ago the old levy court of the District would from time to time repair the surface of the road, making it passable, making the usual repairs on a county road" (Rec., p. 36).

And appellant's witness, George N. Beale, says: "Ray and Boudinot, supervisors under the levy court, expended money, appropriated by the levy court, in graveling Harewood road" (Rec., p. 37).

Neither the testimony of Sheckels nor of Beale show or tend to show that the road in controversy was repaired *before the civil war*. They merely show that it was repaired by the levy court, and, as already pointed out, the old levy court continued to exist up to June 1, 1871. The repairs referred to by Beale and Sheckels may have occurred, and probably did occur, between 1865 and June 1, 1871. At all events, there is nothing in the record to show that the repairs spoken of by them did not occur between 1865 and June 1, 1871. Such is appellant's evidence as to repairs. We submit that upon appellant's own showing *repairs* upon Harewood road, though proved to have been made by the public authorities *after the civil war*, are not satisfactorily proved to have been made by the public authorities *before our late civil war*. As to the repair of Harewood road *after* said war, after 1865, we will have something to say further on.

The foregoing testimony as to user, as to levy court stones, and as to repair is all the evidence, as far as we are aware, upon which appellant relies to establish dedication. We have summed it up by itself, separate and apart from all the explanatory, qualifying, and rebutting proof contained in the record. The foregoing presents appellant's strongest showing on the question of dedication.

No one can pretend for a moment that there is in such evidence any *express* dedication. Such evidence, were it unexplained, unqualified, and unrebutted, might tend to prove a common and public highway *by prescription or long use;*

but we respectfully submit that it does not, and could not, establish or tend to prove such right of highway *by dedication*. Dedication cannot be *implied* from evidence like this. From first to last it contains nothing showing any *intent to dedicate* or any *act of dedication*. Search it from beginning to end and you will find that the owner of the soil has said nothing, and has done nothing, which dedicates or gives his land to the public, or which indicates any intention on his part so to do. He, and he alone, can make a dedication.

But appellant's case is even worse than this, for from the lips of appellant's own witnesses comes damaging evidence that at some time there had been gates across this Harewood road.

To be sure, the record says appellant gave evidence concerning Harewood road "tending to show that from 1848 down to the time of the alleged trespasses, there had been no barrier or obstruction to its use by the public, such as fences, gates, or bars placed there by the owner or owners of the adjoining land, or any one in their interest" (Rec., p. 32).

True, the record states that appellant's witness, George N. Beale, gave evidence "tending to show that *he was taken* along that road to Rock Creek church *to be christened*, and *don't remember that on the way* he had to open any gate or pull down any bars" (Rec., p. 34). Can this be regarded as evidencing that there were *then* no such gates or bars? It is not at all remarkable that a child when "*taken*" to church "*to be christened*" should *not remember gates or bars across the road*. Had he testified the other way, and said he remembered about them, there would indeed have been something worth commenting on.

True, too, the record states that appellant's witness, Theodore Sheckels, gave evidence "tending to show he had known Harewood road since 1848, and that there were *then* no gates, bars or barriers across it, but that there was a gate on the side of it that went into Samuel Harrison Smith's

place, right at the fork of the roads; *that there was also a gate that went into what is now the Robinson place from road on the top of the hill; there was a fence there and a pair of bars*" (Rec., pp. 36, 63).

This is ambiguous, to say the least.

Appellant's witness, John W. Ray, who, according to his own evidence, was a mere boy in 1858, testifies "witness never knew of any gates across said road" (Rec., p. 35).

Surely his evidence does not even tend to disprove gates across said road prior to 1858.

Weak and unsatisfactory as this testimony was as evidencing the absence of gates or bars across Harewood road, it would have been wise for appellant to have rested on it, and appellant blundered in not doing so—in not letting well enough alone—for testimony of appellant's other witnesses indicates that at some time gates existed *across* this Harewood road. The record contains the significant statement, viz:

"That the only evidence, *according to defendant's witnesses*, of a gate or barrier ever having existed *across* said road at any point in its course was the remains of *two ancient gate-posts* at the brow of the hill on the *eastern boundary line* of Agg's place, *one on each side of said Harewood road*, the gate itself having disappeared in the time of Mr. Agg, a former owner, from whom the plaintiff's testator acquired title and before he purchased the land on each side of the road" (Rec., p. 32).

One of appellant's witnesses says:

"There were one or two places where there were gates that went into places to go to the house, but *more across the road* (Rec., p. 36).

Appellant's witness, James Johnson, county policeman from 1869 to 1871, says:

"On the side of the road, opposite the place where this cut or excavation was made, there were *a couple of old gate-posts*, but there had not been a gate there during the time witness had known the road" (Rec., p. 35).

This testimony from appellant's own witnesses certainly indicates that a gate formerly existed *across* Harewood road at the point *where it crossed the* EASTERN *boundary line* of the Agg place (Robinson place). At page 33 of the Record it is distinctly stated that the *two old gate-posts* at this point stood "*one on each side of said Harewood road,*" indicating that a gate or barrier formerly existed "*across*" said road at that point (Rec., p. 33).

In addition to this, one of appellant's witnesses (Tobias Talbott) gave evidence tending to prove that another gate had formerly existed *across* Harewood road at the point *where it crossed the* WESTERN *boundary line* of said Agg place (Robinson place). He, Tobias Talbott, says he lived on the adjoining place from 1840 down to the time of the late war, and further testifies as follows:

"I do not distinctly recollect about any *fences* across Harewood road. I believe there might have been *a gate across this road,* in Mr. Agg's time.

"Q. *Across this road?*

"A. I do not know whether there was. That was the only road that was there. *The gate-posts was there on this road,* but *I do not know* whether there were any *gates at that time.*

"Q. When do you think there was *a gate* ACROSS *this road?*

"A. Well, now, I cannot say. I cannot say whether there was ever a gate; *but there was marks of a gate.* The entrance to the old road was *near about where Mr. Robinson's fence is*—near about the entrance to the Soldiers' Home. *The Soldiers' Home road came out near about the entrance to this gate* and it ran out to Mr. Agg's house when I first knew it" (Rec., p. 33).

This evidence from appellant's witness Talbott clearly indicates that a gate formerly existed *across* Harewood road at the point *where it crossed the* WESTERN *boundary line* of said Agg place (Robinson place). From the lips of appellant's own witnesses, therefore, came this important evidence indicating that Harewood road had formerly been barred by

gates or bars *across* it at some period in the past *both* at its *entrance into* and *exit from* said tract of land. This testimony quoted or referred to above as to gates and gate-posts, coming, as it did, from appellant's own witnesses, was part of appellant's own case. We submit, therefore, that upon appellant's own showing the question of dedication should *not* have been left to the jury.

Explaining, qualifying, and rebutting evidence of the most important character was introduced by appellees, which is conclusive against dedication. Briefly we will refer to it. The record states that the appellees gave evidence concerning Harewood road tending to prove that said lane or road was not a public road or highway (Rec., p. 21); that no right of way or easement over it was ever granted to or dedicated to or condemned by the public (Rec., p. 22); that it ran for about half a mile along the common boundary line between adjoining tracts by a steep and circuitous route, instead of running through the body of the tract, as it might have done, by a much shorter route and much better grade (Rec., p. 21); that travel over said lane or road over said land of plaintiffs' testator originated *for the accommodation* of some prior owner or owners of that tract and the adjoining tract, or of one of said tracts, and of those deriving title from or under such owner or owners of one or of both of said tracts; that afterwards they *permitted* some of their neighbors to travel over said lane or road, and still later *permitted* others also to travel over it, and finally people generally were *permitted* to travel over it (Rec., p. 21); that said lane or road, down to the commencement of the civil war, was little used, and very few people went along it or traveled it before said war (Rec., pp. 22, ~~28~~); *that the owner maintained gates across it from* 1842 *to May* 15, 1857 (Rec., p. 22), and the gate-posts till some time in 1861, after the civil war had commenced (Rec., p. 22); that said lane or road was *not repaired or recognized* by the public authorities prior to the close of the late civil

war—prior to 1865 (Rec., pp. 23, 25, 26); that the owner *prevented its repair* by public authorities, after 1865, when he saw fit, *making them undo* what they had done if he objected to it (Rec., pp. 23, ~~24~~, 26); that John Agg, who preceded plaintiffs' testator in the ownership of said tract, *changed the location* of part of said lane or road by his *own* employés, at his *own* expense, for his *own* reasons, and because of his *own* wishes (Rec., p. 21); that *taxes* were *assessed* by the public authorities upon and *paid* by the owner upon said lane or road *as private property* (Rec., pp. 22, 25); that said lane or road was *never surveyed, plotted, or recorded* as a public road or highway (Rec., p. 21); that between 1866 and 1868 boundary stones, marked "L. C.," were placed along said road about 33 feet apart from one side to the other and *beyond the width of the road-bed as used* through the lands of plaintiffs' testator by the late levy court of this District, *but that neither plaintiffs nor their testator in his lifetime ever recognized the right of any one to plant said stones, and that plaintiffs and their testator dug up some of said stones for whatever purposes he or they desired* (Rec., p. 25); that plaintiffs' testator built *a stone wall* several hundred feet long within the limits of said lane or road (Rec., p. 22), and that plaintiffs' testator *exercised other acts of ownership* over the land within the limits of said lane or road *from his purchase, on May* 15, 1857, *to his death, on January* 31, 1884 (Rec., p. 22).

Such was the proof on behalf of appellees. Upon the whole evidence, therefore, in the case at bar the question of dedication unquestionably should *not* have been left to the jury at all. The court below should have taken that question from the jury.

A dedication—as the derivation of the word imports—is a gift. Its three essential elements are: 1st, *intent* to dedicate; 2d, *act* of dedication; 3d, acceptance of dedication. Mere *intention to* dedicate does not of itself amount to a dedication, for such intention may never be carried out. One may contemplate doing a thing or intend to do a thing, yet never

do what he contemplated or intended. The intent counts for nothing unless put into execution. The *intent to* dedicate is therefore wholly separate and distinct from the *act of* dedicating. The *intent* is necessary; the *execution* of that intent is equally necessary. A party is not bound by, and may revoke, mere *intention to* dedicate because without consideration. He may for the same reason change his mind and repudiate it, even after an express act of dedication, if the dedication has not been accepted. In the dedication of a road to the public the *intent* to dedicate and the *act* of dedication must come from—spring from—the owner of the soil. It is wholly immaterial what others intend or do. No one can divest another person of his property on the ground of dedication, either without or contrary to such owner's own intentions or own acts. The acceptance of his dedication must be by the proper authorities who are authorized to act for and on behalf of the public. On these points we refer you to the following authorities:

The highest court of Iowa says:

"To constitute a good dedication, there must be an *intention* and an *act* of dedication, and an *acceptance* on the part of the public."

The State *vs.* Green, 41 Iowa, 695.

The highest court of Indiana says:

"To constitute a valid dedication there must have been *an actual* INTENTION *on the part of the owner or owners, clearly indicated by unequivocal* ACTS OR CONDUCT, to dedicate the land to the public, for use as an alley, and there must have been an *acceptance* by the public of the land dedicated. * * * Unless there appears *an actual intent to dedicate on the part of the owners*, the court cannot do otherwise than to find that there was *no dedication.* * * * Mere *evidentiary facts*, such as permitting the public to pass over land with the owner's permission while he uses the land for his own purposes, or until he chooses to devote it to other uses, *do not constitute themselves dedication.* The dedication must

have been *clearly manifested by unequivocal acts or declarations.*"

Shellhouse *vs.* The State, 110 Ind., 513.

The court of appeals of Virginia say:

"To constitute a dedication there must be an *intention* to appropriate the land for the use and benefit of the public. The intention, the *animus dedicandi*, is the vital principle of the doctrine of dedication. The acts and declarations *of the land-owner* indicating such intention must be *unmistakable* in their purpose, and *decisive* in their character, to have that effect. * * * The very term dedication shows that the *intent* is material. There cannot be such a thing as turning land into a road *without an intention on the owner's part.* * * * *The use, without the intention to dedicate as a public way, not being a dedication.*"

Harris *vs.* The [illegible]., 20 Gratt. (Va.), 837, 838.

"The acts and declarations of the land-owner, indicating the *intent* to dedicate his land to the public use, must be *unmistakable in their purpose* and *decisive in their character* to have that effect."

Washburn on Easement, *p. 134; 4th ed., 211.

In Brinck *vs.* Collier, the court say:

"To constitute a valid dedication of land to the public, there must be a *clear intention on the part of the owner to dedicate,* * * * and there must be an *acceptance* of such dedication by the public."

Irwin *vs.* Dixion is here cited as holding that "a dedication must rest on the *clear assent of the owner*—to be proved by deed, or unsealed writing, *or by acts inconsistent and irreconcilable with any construction except such assent,*" and as also holding that "*the mere fact of user by the public did not constitute a dedication* where such user was merely incidental to the convenience of the owner, who would not be *captious* in preventing others from traveling the same road so important to himself."

Brinck *vs.* Collier, 56 Mo., 164, 165, 166.

Individual members of the community, few or many, cannot accept such dedication. The acceptance must be by the regularly constituted public authorities who represent and act for the public in such matters. It is unnecessary to multiply authorities in support of this last proposition. The doctrine is clearly stated in Kelly's case. The court of appeals of Virginia, Leigh, J., say:

"It is clear that there must be *not only a dedication*, but *an acceptance* of the road. What is an acceptance? Is the mere passing over the road by individuals an acceptance? If so, what number of persons passing over it will amount to an acceptance—ten, fifteen, twenty, or what number? It is obvious, if the acceptance depends upon the number of persons passing over the road, there will be often great uncertainty, whether the road be public or not, which may give rise to much troublesome litigation. To guard against this uncertainty and litigation, the right of *acceptance* ought to be vested in *some public body*. And we think that by the laws of this State this right is vested in the county courts. They alone are authorized to establish public roads, and they are to see that they are kept in repair. If we are right in this opinion, the *acceptance* of a public road must be *by record;* for the county courts *can speak only by record*."

Comm. *vs.* Kelly, 8 Gratt. (Va.), 636.
Mansur *vs.* The State, 60 Ind., 362.

The highest court of Massachusetts says:

"We are strongly inclined to the opinion, that whatever may be the law in England, in this Commonwealth, no public way can be established by dedication merely, and without the assent, express or implied, of the city or town bound by law to keep it in repair. If such were not the law, any land-owner, as Morton, J., justly remarks in Hobbs *vs.* Lowell, 19 Pick., 405, 411, might for his own interest, and without regard to public convenience or necessity, establish a highway and subject the town within which it lies to the burden of supporting it."

Bowers *vs.* Suffolk Mfg. Co., 4 Cush. (Mass.), 340.
Mansur *vs.* The State, 60 Ind., 362.

And so it is held that a town could not be held responsible for accidents on a dedicated road "unless the town or its lawfully authorized agents shall in some way signify their *acceptance* of such dedication," the court saying:

"We know of no case in this country where a way by dedication has been held to be established so as to impose any liability upon a city or town, without evidence of the assent of the corporation, express or implied."

Mayberry *vs.* Inhabitants of Standish, 56 Me., 353, 354.
Mansur *vs.* The State, 60 Ind., 362, 363.

"Where lands are dedicated by the owner to public use as streets, they do not become public highways until *accepted* as such by the public authorities."

The City of Oswego *vs.* The Oswego Canal Co., 6 New York, 257.
Mansur *vs.* The State, 60 Ind., 363.

In a West Virginia case the court, Holt, P., say:

"The proof shows that this road has been used as a way continuously by the public, in the sense of being traveled by any and all who saw fit to pass over it, for 60 years or more, &c. * * * No *acceptance* thereof by the county court appears, and *it must be taken that none was ever made, as the county court speaks only by record.* It has long been the settled law in this State that the mere *user* of a road by the public, for however long a time, *will not make it a public road.* On the contrary, the mere permission by the owner of the land to the public to pass over the road is, without more, to be regarded *as a license revocable at his pleasure.*"

Boyd *vs.* Woolwine, 40 W. Va., 286.

In the case at bar *no record* of the levy court or county court is in evidence showing or tending to show any *acceptance* of Harewood road as a public road, and so, as stated by Holt, P., *supra*, "it must be taken that there was none." Be this as it may, however, we will not waste further time on the question of acceptance, because in the case at bar it is perfectly manifest there was no intention to dedicate or

act of dedication. There can be no *acceptance* of a dedication on the part of the public unless there is an *intention to dedicate* and an *act of dedication* on the part of the owner. In the case at bar there is no evidence to prove either of these essential elements of dedication, and there is abundant evidence to disprove them, as pointed out above.

It is to be remembered, too, that Harewood road did not run through the *cultivated* portion of testator's tract, but through *timbered* land (Rec., p. 25); that Agg, by his own employés, at his expense, and in accordance with his own reasons and wishes, had changed the location of part of said road (Rec., p. 21), and that plaintiff's testator had built a wall within the limits of said road (Rec., p. 22); had stopped and prevented repairs by the public authorities and made them undo what was contrary to his wishes (Rec., pp. 23, 25, 26), and had exercised other acts of ownership over the land within its limits (Rec., p. 22), and paid taxes assessed thereon as though it was private property (Rec., pp. 22, 25). It is also to be remembered that in addition to the boundary fences enclosing the entire Agg or Robinson tract, called the "Vineyard," there was a *fence* on the *south* side, but *none* on the *north* side of said Harewood road where it crossed said "Vineyard" tract (Rec., p. 22), leaving a portion of said tract to the south of said road and a portion on the north of said road (Rec., p. 23), and there was evidence of the maintenance of gates *across* said Harewood road where it crossed the eastern and western boundary lines of said "Vineyard" tract from 1842 to May 15, 1857, and of the gate-posts at those points down to some time in 1861, after the commencement of the civil war (Rec., p. 22), if not longer.

"A *single* act of interruption by the owner is of much more weight, upon a question of *intention*, than many acts of enjoyment."

Shellhouse *vs.* The State, 110 Ind., 513.
Harris *vs.* Comm., 20 Gratt. (Va.), 838.
Poole *vs.* Huskinson, 11 Mees. & Welsb., *p. 830.

In Kelly's case the court of appeals of Virginia say:

"In England the price of land is high and owners prohibit with great care all trespasses upon it. In this country the price of land is not high; nor do owners of it guard against trespasses on it with the same care; and it is known to all who have lived in the country, that, &c., owners frequently permit roads to be opened through their forest and other lands not in cultivation *without the least intention of dedicating these roads to the public.* Many roads so opened remain for long periods, and, indeed, they are not often closed *until the owners have occasion to cultivate the land through which they run.* Even in England there must be the *animus dedicandi.* * * * A permission to pass over land may prove an intention to dedicate or a mere *license* revocable at the will of the owner; and we think that the mere permission to pass over land ought in this State to be regarded as a *license.* For why shall we *infer* that an individual makes a *gift* of his property to the public from an *equivocal act which equally proves an intention to grant a mere revocable license?* The public is not injured by this view of the subject. *It has the accommodation of the road as long as the license continues,* and after the license is revoked, the road may be made public if the public convenience requires it, *by making compensation to the owner.*"

Comm. *vs.* Kelly, 8 Gratt. (Va.), 635, 636.

In the case in 56 Missouri, *supra,* the court say:

"The evidence of dedication of a way may be rebutted by proof of *any acts on the part of the owner of the soil, showing* that *he only intended* to give *license* to pass over his land and *not* to dedicate a right of way to the public."

Brinck *vs.* Collier, 56 Mo., 165.

It is further said by the court in that case:

"All the facts proved are entirely *consistent* with an *intention* on the part of Collier *to retain his rights of property* in the way opened; but some of them are entirely *inconsistent* with the hypothesis of an *intention to dedicate.* * * * The length of time (about 25 years) during which the way was

used amounted to nothing, since the user was *subordinate to* the proprietory rights" (*id.*, pp. 168, 169).

In a Massachusetts case, tried in 1823, where dedication was contended for, there was testimony (p. 52) that for 50 years the way had been called "the town way;" that it had been repaired by the town 45 years ago and since, until 1821; that it was fenced on the south side the whole distance, nearly on the line, but in one place the fence was a little off from the line; that 23 to 27 years before the entrance had been changed or altered by the proprietors of the land so as to run straight; that there had been a great deal of traveling on this way by the inhabitants of Newbury, especially with carts; that the traveled path had been for 23 years according to certain straight lines on a plan which was produced; that a gate had been put up, and that the gate used to be kept up about four months in the year. The court, Parker, C. J., held, however, that there was no dedication, saying:

"Paths across the pasture have undoubtedly been used for 50 or 60 years, probably much longer, but no fixed determinate way is proved, the witnesses on the part of the Government testifying that, *less than 30 years ago, the entrance from Low street has been changed by the proprietors of the land adjoining.* * * * Besides, in this case *a dedication is negatived* by the fact, that *gates* were established and kept up by the proprietors of the land; which is a sufficient indication, that although they were willing people should pass over the pasture, *they did not mean to give the land over which the way passed, or surrender their right of discontinuing the use.* The English doctrine of dedication is very well settled. There must be *a manifest intention* to accommodate the public through a man's land, before he shall be held *by implication* to have given it; so that even when at the first opening of such a way *a post only* had been put up, which had been *soon knocked down* and *remained down* 12 *years*, and the passage had been uninterrupted all that time, it was determined that the owner might maintain trespass

against those who used it as a way, and for that purpose pulled down a gate recently erected."

Comm. *vs.* Newbury, 2 Pick. (Mass.), 56, 57, 58.

In a Tennessee case (pp. 60 and 61) neighbors had for nearly 30 years used a road through a field as a mill and church path and as a way to the village, and had occasionally repaired it when it needed repair. When the field was inclosed gates or bars were erected where the inclosure crossed the path on either side. The original proprietor of the soil, who inclosed the field, had been known to assist the neighbors in repairing the way. In an action of trespass for injuries to the soil by "*digging it*" for the purpose of *repairing* the way, the court say:

"There is no evidence in this record showing a *dedication* by the owner, of the *way* in question, to the use of the public, or of any such *intention* on his part. The proof establishes nothing more than a mere *license* or *permission*, by the owner, to the inhabitants of a local neighborhood, to use the pathway, as a matter of *favor* and *convenience*. And such use being by *sufferance*, during the pleasure of the owner, he had the right to put an end to it at any moment. * * * That a right of way may be claimed by a dedication to the public use, by the owner of the soil, is not denied; but, with us, this doctrine must be *cautiously admitted*. Its too easy application would *defeat* the right of the owner of the soil to have *compensation* for the damages sustained by laying out a road over his land, to which he is entitled, when such a road is laid out by the proper authority."

Worth *vs.* Dawson, 33 Tenn. (1 Sneed), 62, 63.

In the Iowa case cited *supra* the court say:

"It seems to us that *the existence of such gates and bars alone sufficiently show* that the public use was not under a claim of right, and *that there was no intention to dedicate* the traveled track, as a public highway."

The State *vs.* Green, 41 Iowa, 696.

It should also be remembered that in the case at bar Harewood road has always been used by the owners of the soil for their own convenience; they traveled it as their own road of ingress and egress to and from their residence, and so had no motive to be unneighborly or captious about permitting others to use it, so long as they did no injury. In a Missouri case the court say:

"The bare fact, that a farmer leaves a lane through his farm for his own convenience, and *permits* the public to use it as a highway, *does not authorize any inference that it is his intention to dedicate such road to the public.* On the contrary, in most instances in our country, *no such idea is entertained.* The road is left for his *own* convenience and it is changed from time to time or entirely closed as that convenience may require. It is very different from the case of the owner of ground in a city, who lays out streets and sells out lots in accordance with a plat. To apply principles which have been held to imply such dedications in cities and towns to the customs prevalent in a sparsely settled agricultural district, would lead to manifest injustice."

Stacey *vs.* Miller, 14 Mo., 479.

This question came before the Supreme Court of the United States in the case of Irwin *vs.* Dixion, where it was contended that a road which had been used by the public as a highway for more than thirty years was a highway both by dedication and by prescriptive use or long use. The Supreme Court in deciding against both contentions say:

"The length of time of the user was enough, it having been 20 or 30 years. But the dedication must also be under *such circumstances* as to indicate an abandonment of the use *exclusively* to the community by the owner of the soil. Hence there must not have been, as here, repeated declarations made by the owner *inconsistent with any dedication.* Nor must the acts or words be *equivocal* or *ambiguous* on that subject. In short, the idea of a dedication to the public of a use of land for a public road must rest on the *clear assent of the owner in some way to such dedication.* * * *

"It is not pretended that in any way has such *consent* been given here, except by the acts before referred to, and *done under the explanatory circumstances accompanying them.* * * * The idea of a *clear intent* to dedicate the *locus in quo* for that purpose, which we have seen is necessary to sustain it by dedication, is further *repelled*, as before in part suggested, by the very circumstances, that this space while open and thus used was designed for the *owner's* purposes, rather than for the purposes of others. * * * Besides this, the space, being open for many years, was manifestly convenient, if not necessary, for the accommodation and interests of the owners of all this property. * * * While, then, *anybody* might be allowed to travel over this space from the warehouse east to the wharf and river, when convenient *and not injuring the owner*, it would *not be because* it had been intended to give to the public a right of way over these premises, *but because* he himself intended to travel over it, and while so doing, and so leaving it open, would not be *caption* in preventing others from traveling there. This was not meant to give to others any *exclusive* rights or privileges there, but merely *a favor in subordination to him and his rights*, as will be clear from various other circumstances during the twenty or thirty years. * * * He and his father * * * were accustomed to use this open space for other private purposes, &c., as well as for a passage to and from their wharf. They uniformly continued *to pay taxes on it*, as if entirely *private* property, and the city continued *to assess taxes on it* to them as owners, rather than refraining to do it, as in case of highways generally. * * * *Circumstances like these seem entirely inconsistent with the idea that any intended dedication had been made of these premises, or the use of them, to the public.* The effect of these circumstances is to *undermine and destroy* also the other ground set up by the bill, as well as the decree below, that a public highway had been established there, not by dedication, but by over 30 years' use of the land for that purpose by the community."

Irwin *vs.* Dixion, 9 How., 30, 31, 32, 33.

S. P., Harris *vs.* Comm., 20 Gratt. (Va.), 837, 838, 839, 841, 843.

So, too, the court of appeals of Maryland, Alvey, J., say:

"It is incumbent upon it (the city) to establish *clearly and beyond doubt*, that such dedication has been made, and that too to the extent claimed. * * * An *intent* on the part of the *owner* to dedicate his land to the particular use alleged *is absolutely essential;* and *unless such intention is clearly proved* by the facts and circumstances of the particular case, *no dedication exists.* * * * As dedication will be presumed *where the facts and circumstances of the case clearly warrant it*, so that presumption may be *rebutted*, and *altogether prevented from arising*, by circumstances *incompatible* with the supposition that any dedication was *intended*."

McCormick *vs.* Mayor, &c., of Baltimore, 45 Md., 523, 524.

In a Kansas case three commissioners were appointed on September 20, 1869, to lay out and establish a public county road, and on December 6, 1869, the proceedings culminated in the attempted establishment of the road in controversy as a county road on the route of an old Indian trail. Only *one* of the commissioners out of the *three* appointed acted in viewing and locating the road. Some time after the supposed establishment of this road, but just when was not shown, the road was opened and improved by the road overseer, and it was traveled ever since then. Two of the commissioners not having acted in viewing and locating said road, the State then contended that the road had become a public highway by *prescription, limitation*, or *dedication.*

The court say:

"Has the present road been created a public highway in any such manner, or in any manner whatever? That the road has not been created a public highway by any kind of proceedings under the statutes of Kansas, is clear beyond all question. Nor has it been created a public highway by any *express* dedication; for no owner of the land * * * has ever *expressly* dedicated the same as a public highway; and there has never been any *implied* dedication *unless it is such*

a dedication as arises from prescription or limitation. Therefore, if such road has ever become a public highway at all, it must have become such by *prescription* or *limitation* or *a dedication in the nature of prescription or limitation.* * * * Fifteen (15) years in this State is the limitation prescribed by statute for the commencement of civil actions for the recovery of real property held adversely to the owner. The mere fact that individuals—many or few—may have traveled along this road or over the same *for more than* 15 *years*, is not enough to constitute it a public highway. * * * Individuals travel over the ground merely because it is convenient for them to do so, and generally without any expectation or design or authority to constitute the place where they travel a public highway; and *by such traveling they cannot set in operation any prescriptive right, or any right by limitation.* In order to *start* in operation any *prescriptive right*, or any *right by limitation*, to use a piece of ground as a public highway, the public by its constituted authorities must take the actual possession of the ground and use it as a public highway.

"The public by its constituted authorities did not take possession of this property as a public highway prior to the attempted establishment of the same as a public highway, which was December 6, 1869; and probably the public by its constituted authorities did not take the possession of this property as a highway for many months, possibly years, after that time. When it was first opened or worked *by the road overseer* is not shown, but *it was more than* 15 *years before this action was* commenced. It was not 15 years from December 6, 1869, when the attempt was made to establish this road as a public highway, to August 18, 1884, when this action was commenced. * * * Hence there is no room in this case for any right by *prescription* or *limitation* to operate, and under no aspect of this case can this road be considered as a public highway."

The State *vs.* Horn, 35 Kan., 720, 721.

In an Indiana case the jury rendered a special verdict and found that in December, 1846, the road in controversy was opened up *by the public* as a public highway, and intended *by the public* at that time and ever since to be a public highway; that it was obstructed but very tempo-

rarily by a fence on July 1, 1866; that from July 1, 1866, to May 23, 1882, it was used, occupied, and continually traveled by the public generally, and money and labor expended upon it by the public authorities from year to year from July 1, 1866, until May 23, 1882, when it was again obstructed by a fence, which was torn down and removed by direction of the mayor, city marshal, and street commissioner two days after its erection, doing no more damage than was necessary to remove the obstruction; that with the exception of the temporary fence on July 1, 1866, it had been continuously used by the general public as a highway and worked by the public authorities for more than twenty years prior to the commission of the grievances complained of; that prior to the commission of the acts complained of, the owner allowed it to be used for the purpose of a highway, and the public then and there accepted the same and have worked and continually used and traveled the same from that time to the present, except when obstructed, as aforesaid; that the owner knew all the time that such road was so used, traveled, and worked by the public, and during all said time neither by word nor act made any objection thereto; that houses had been built in additions to Warsaw beyond the lot, and that people in such additions would have no means of ingress and egress eastward except along the highway in controversy, and if it were closed their property would be less valuable.

The court above say:

"Upon the facts found by the jury in their special verdict, the substance of which we have given, did the trial court err in rendering judgment for the appellee? Or, in other words, are those facts *sufficient to show a dedication* by the appellee or any of his grantors, near or remote, of his lot in the town or city of Warsaw, &c., or any part thereof, to the purposes of a street or public highway? Can it be correctly said that the owner of an uninclosed and unimproved lot, in a town or city, who knows of and *passively acquiesces* in the use by the public of such lot or part thereof,

for street or highway purposes, until such time as he may be able and willing to inclose and improve the same, thereby dedicates such lot or part thereof to the use of the public for such purposes? *We are of opinion that each of these questions must be answered in the negative.* It will be observed that the jury have nowhere found, in their special verdict, any *express or actual dedication* by the appellee or any of his grantors, near or remote, of his lot in the town or city of Warsaw, or any part thereof, to or for the use of the public for street or highway purposes. Nor have the jury found, in their special verdict, that the appellee or any of his grantors, near or remote, ever *intended to dedicate* the lot described in his complaint, or any part thereof, to or for the use of the public for street or highway purposes. * * * The jury have wholly failed to find, in any of the paragraphs of their special verdict, the *animus dedicandi* on the part of the appellee or any of his grantors, near or remote; and *in the absence of such a finding, the trial court could not do otherwise,* upon the other facts found by the jury, *than to render judgment for the appellee.*"

Tucker *vs.* Conrad, 103 Ind., 353, 354.

In the case at bar we say what was said by the court in Harris' case (*supra*):

"The facts proved are wholly *incompatible* with the supposition that the lot (road) in question has been dedicated to the public. On the contrary, they *clearly show* that no such dedication was ever made, or in the contemplation of the owners; and the court below should so have instructed the jury. The instruction given to the jury was a plain *intimation* that they *might presume a dedication* from the facts and circumstances proved; and, as such, was clearly erroneous."

Harris *vs.* The Comm., 20 Gratt (Va.), 843.

DEFENDANT'S EIGHTEENTH PRAYER asked the court to instruct the jury that on the whole evidence Harewood road was *a public road by dedication* (Rec., p. 47).

The foregoing review of the evidence in this case and of the law applicable to the same conclusively shows that de-

fendant's eighteenth prayer was properly refused, ~~and that there is nothing in appellant's twenty-fourth assignment of errors.~~

DEFENDANT'S SEVENTH PRAYER as respectively asked and granted is as follows:

"The jury are instructed that in order to constitute dedication of the land in the declaration for the use of the public as a highway it is sufficient if [its owner assented to its use by] *the jury find from the evidence that the plaintiffs' testator intended to give or dedicate the land claimed as a road to* the public, and that the public actually enjoyed its use for that purpose for such a length of time prior to 1880 that the public accommodation might be materially affected by a denial of such enjoyment" (Rec., p. 45).

The bracketed words, "its owner assented to its use by," were struck out by the court, and in lieu thereof the italicized words, "*the jury find from the evidence that the plaintiffs' testator intended to give or dedicate the land claimed as a road to*," were inserted by the court, and, as so modified, said prayer was granted by the court (Rec., p. 44, note, and Rec., p. 45).

To say that the public actually enjoyed its use is merely to say that individual members of the community enjoyed its use, and we have already seen that such use by individuals cannot operate as an acceptance by the duly constituted public authorities; nor does the fact that public accommodation might be materially affected by a denial of such enjoyment in any way affect that question. It does not and cannot convert mere individuals who enjoy the use of a road into duly constituted and properly authorized public authorities. Said seventh prayer as asked lacked all three essential elements of dedication, viz., an *intent* to dedicate, an *act* of dedication, and an *acceptance* by the proper public authorities. To say that its owner *assented* to its use is not equivalent to saying that he dedicated or intended to

dedicate. Were the word "*assented*" susceptible of that construction, still it is equally susceptible of the opposite construction, and is constantly used in the opposite sense. Indeed, wherever a road has been used by permission, leave, license, favor, indulgence, or acquiescence, the owner can be said to have *assented* to its use. The authorities show, however, that such use and enjoyment not only *indicates no intent to dedicate*, but actually *negatives such intent.*

The prayer as asked, with the bracketed words and without the italicized words, was fatally defective. The court's modification improved it considerably by introducing the idea of an *animus dedicandi*, but as asked and granted, an *act* of dedication and an *acceptance* of the dedication by the duly constituted public authorities are wholly dispensed with. All idea of 20 years' use is likewise dispensed with in said seventh prayer as asked and as granted. Speaking of just such a prayer, the court in an Indiana case say:

"Where the State relies upon a user of the land for less than 20 years as evidence that the owner intended a dedication of the land to the public for a highway, or as authorizing a presumption of such dedication, we think the court should fairly instruct the jury trying the cause, to the effect that, *unless they were satisfied*, upon all the evidence in the cause, * * * that the defendant *intended* to dedicate or grant such land to the public, for the purposes of a public highway, *they must find for the defendant.*"

Mauck *vs.* The State, 66 Ind., 185.

Appellant says the court's modification limited dedication to the plaintiffs' testator, whereas the jury were entitled to find a dedication by testator's *predecessors in title*, ~~(Appellant's Brief, p. 31).~~

In our review of the evidence we have already called your attention to the fact that, even as to said testator, there was not sufficient evidence on the question of dedication to have justified the court below in leaving that question to the jury

at all; and if this be so, defendant's seventh prayer should have been refused out and out.

The evidence which must be relied on in support of dedication by plaintiffs' testator is certainly shadowy enough, but when we come to testator's *predecessors in title* there is absolutely not a particle of evidence, not a word of testimony, not a lisp from any witness tending to show any act of dedication or intent to dedicate by testator's *predecessors in title.*

The record shows that Conway Robinson, the plaintiffs' testator, acquired and entered into possession of said place called the "Vineyard" on May 15, 1857, under his deed of that date, and resided with his family upon said tract from May 15, 1857, to his death, on January 31, 1884 (Rec., pp. 19, 20, 22).

The record shows an absolute dearth of evidence of dedication prior to May 15, 1857. You will observe that said testator's occupancy and possession commenced about three years before our civil war. To prove, or to even tend to prove, dedication by testator's *predecessors in title* it is not enough that such proof should merely go back to a time prior to the commencement of our civil war, 1861, but it is essential that it should go back to a time prior to the commencement of testator's occupancy, which began on May 15, 1857. What proof of dedication is found in the record prior to that time? What evidence does the record contain that even tends to prove a dedication prior to that time? We submit that there is absolutely none.

Defendant's witnesses, J. Enos Ray and James Johnson, may possibly be said to give some vague and shadowy testimony concerning repairs to Harewood road by the levy court prior to the war (Rec., pp. 34, 35), but they don't fix at what time prior to the war those repairs were made; and, for all that appears, the earliest repairs they speak of, if made at all, may have been made just before the war. Neither of them pretend to say that any such repairs were ever made prior

to May 15, 1857. No other witness testified to any repairs to Harewood road by the public authorities before our civil war, and *a fortiori* testified to none before May 15, 1857. Moreover, defendant's witness, Tobias Talbott, contradicts J. Enos Ray and James Johnson. He testified *that from* 1840 *down to the time of our civil war* he worked for Mr. George W. Riggs, and lived west of the Agg tract, now Robinson tract, upon the adjoining place, *which was then owned by George W. Riggs*, now being the Soldiers' Home grounds; that witness knew old man Enos Ray, now deceased, very well, and that witness never saw old man Enos Ray working Harewood road (Rec., pp. 33, ~~34~~).

In short, there is an entire lack of proof *from appellant's witnesses* of any repairs to Harewood road by the public authorities during the time of testator's *predecessors in title*, viz., prior to May 15, 1857, whilst *appellees' evidence* affirmatively proved that Harewood road "was *not repaired* or *recognized* by the public authorities *until after the late civil war*" (Rec., pp. 23, 2~~5~~). Then there is the affirmative proof that during the whole long period of 15 years *from* 1842 *down to said deed of May* 15, 1857, to testator, *gates* were actually maintained by testator's *predecessors in title* across said Harewood road, *barring the same* where it *crossed* the boundary lines of this "Vineyard" tract (Rec., p. 22), and that *gate-posts* (one on one side of said road and the other on the opposite side of said road) of such gates continued to stand for some time thereafter, and until some time in 1861, after our civil war had commenced (Rec., p. 22).

Then, too, testator's *predecessor in title, John Agg*, bodily *picked up and moved* a part of this Harewood road further from his house at his own expense, by his own paid employés, for his own reasons, and in accordance with his own wishes (Rec., p. 21). Then, too, *taxes were assessed and paid* upon Harewood road as private property during testator's time and during the time of testator's *predecessors in title* (Rec., p. 22~~5~~). Then, too, its origin, for the mere *accommoda-*

tion of owners of adjoining tracts, and its subsequent *permissive* use were proved (Rec., p. 21).

So far as testator's *predecessors in title* are concerned, such was the showing and the only showing made in the case at bar. We say, as we said before, there was certainly no evidence whatsoever in the case at bar to warrant or justify the question of dedication by testator's *predecessors in title* being submitted to the jury, and we submit that, lacking such evidence, defendant's seventh prayer was right in not submitting to the jury dedication by testator's *predecessors in title*. For these reasons appellant is not prejudiced by and received no injury from the court's modification of defendant's seventh prayer. Were it otherwise, however, such objection would be cured by defendant's twenty-second prayer, which, as granted by the court, left to the jury the very question of such dedication by testator's *predecessors in title* (Rec., pp. 47, 55).

~~We submit, therefore, that there is nothing in appellant's sixteenth assignment of errors.~~

DEFENDANT'S TWENTY-SECOND PRAYER as respectively asked and granted is as follows:

"The jury are instructed that the plaintiffs' testator was and the plaintiffs are estopped from asserting that Harewood road was not a public highway, if the jury believe from the evidence that the owner of the land and plaintiffs' testator after he became owner [threw open his land or] allowed it to remain open intending to dedicate it for a highway and the public used it for such length of time that they would be seriously inconvenienced by the interruption of the enjoyment. *In determining whether the plaintiffs' testator intended to dedicate the land or any part thereof where the alleged trespasses were committed to the public for the purposes of a road the jury should take into consideration all the evidence showing the use made by the public of said road, the acts of the public officers, and the acts and conduct of the said testator in relation thereto*" (Rec. pp. 48, 47).

The court struck out the words in brackets and added the italicized words, and granted said prayer as so modified (Rec., p. 44, note, and Rec. pp. 48 & 47).

There is no evidence that the testator or any predecessor in title *threw open his land*, and for this reason the court properly struck out the bracketed words.

This prayer not only allowed the jury to find a dedication from the mere fact that *any owner of the land* allowed it to remain open, intending to dedicate it for a highway, and the public used it for such length of time that they would be seriously inconvenienced by the interruption of the enjoyment, but it went further and instructed the jury that such facts would estop both the plaintiffs' testator and the plaintiffs from asserting the contrary. The court's modification told the jury what they were to consider in determining whether the *plaintiffs' testator* intended to dedicate the land or any part thereof. It was silent (except by analogy) as to what they were to consider in determining whether any *other owner* intended to dedicate the same or any part thereof; but the court's modification in no way confined the prayer to a dedication by plaintiffs' testator, though, in our opinion, the court ought to have so confined it for the reasons given by us in considering defendant's seventh prayer. Almost all that we said as to defendant's seventh prayer is equally applicable to defendant's twenty-second prayer. There is certainly no evidence in the case at bar tending to support dedication by testator's *predecessors in title*, and though the court in this prayer did not take that question from the jury we submit that it should have done so. Moreover, the prayer as asked went entirely too far in favor of appellant in instructing the jury that the facts enumerated in it constituted an estoppel. Nor was this vice cured by the court's italicized words, so far as testator's *predecessors in title* were concerned, for these italicized words are silent as to such *predecessors in title*, and so the original vice still exists as to them. It is erroneous for the court to instruct

the jury that such facts are conclusive upon the owner of the soil or estop such owner from showing there was no dedication.

In Mauck's case the third charge of the trial court enumerated just such facts as those stated in defendant's twenty-second prayer, and was substantially of like tenor and effect, and concluded with the sentence "In such case the owner of the land over which such road would pass would not have the right to shut up such road."

The court above say:

"We are clearly of the opinion that the last sentence of this 3d charge *does not contain* a true statement of the law of this State; for it makes the facts recited therein, which at most would be merely 'evidence that the owner intended a dedication to the public' *so absolutely conclusive* of the owner's rights in the premises, as to amount to *an absolute estoppel.* Surely, this is not the law in any case. * * * Such evidence or presumption of a dedication *is not conclusive* of the question; but the defendant in such a case as the one at bar certainly has the right, and ought to be permitted, to show by evidence, if he can, that in point of fact *he never intended a dedication.* The presumption of a dedication, arising from the facts stated in the third charge, as it seems to us, may be contradicted, rebutted and overcome by evidence and facts which show or tend to show that the owner of the land, over which the supposed public highway may pass, *never intended a dedication of such land to the public for the purposes of such highway.*"

Mauck *vs.* The State, 66 Ind., 184, 185.

We submit that appellant is in no way prejudiced by the court's action upon defendant's twenty-second prayer, ~~and that there is nothing in appellant's twenty-seventh assignment of errors.~~

DEFENDANT'S EIGHTH PRAYER, which was refused, is as follows:

"If the jury believe from the evidence that the use by the public of the width of 20 feet of Harewood road was under

a claim of a grant of a road of the width of 33 feet, then the defendant is not chargeable with the alleged trespasses and the verdict should be for the defendant" (Rec., p. 46).

AND DEFENDANT'S TENTH PRAYER, which was refused, is as follows:

"If the jury believe from the evidence that at the point in Harewood road where the alleged trespasses occurred the public used 25 feet of the width of said road for all the purposes of a public road under claim and color of a grant of a road of the width of 33 feet, and that for a period of more than 20 years prior to 1880 the entire width of 33 feet was vacant and unobstructed land, and that such use under such claim by the public was open, notorious, and uninterrupted for said period, then the plaintiffs cannot recover, and the verdict should be for the defendant" (Rec., p. 46).

There is no evidence whatsoever in this case on which defendant's eighth and tenth prayers, or either of them, can rest; there is no proof to warrant or support them.

These was *no proof* tending to show that 20 or 25 feet in width of roadway had been used under claim or color of a grant of a 33-foot roadway; but, on the other hand, there was affirmative and uncontradicted evidence that at least 8 feet of such 33 feet never was used at all by the public as a road or highway (Rec., p. 23), and that the whole width of 33 feet was not vacant and unobstructed land, but that the same encroached several feet upon and extended several feet within testator's fences and enclosures (Rec., p. 32).

These are good and sufficient reasons for the refusal of these prayers.

Had the facts, however, which are recited in these prayers been fully and satisfactorily established by the evidence, still these prayers were fatally defective and bad, because they each instruct the jury that upon the recited facts "*the verdict should be for the defendant*" (Rec., p. 46). Such a result would not follow as a matter of course. If the defendant

had a public right of way of the full width of 33 feet, yet if they merely had a public right of way of that width *over the surface of the ground*, and had *no right to excavate or grade the same* as they did, the verdict should not be for the defendant, but would have to be for the plaintiff. So, too, if the defendant had a public right of way 33 feet wide, and had also the power to grade the same, yet if they never exercised that power, but made the trench and excavation in Harewood road for the purpose of getting gravel for the repair or improvement of another and distant public road, without exercising their power to grade Harewood road, such acts would be unlawful, and the verdict should not be for the defendant, but would have to be for the plaintiff. We will hereafter consider both of these propositions more fully in another connection, and at this point we merely mention them without here discussing them. They are well supported by the authorities.

For the reasons mentioned, we submit that there was no error in the court's refusal of defendant's eighth and tenth prayers, ~~and that there is nothing in appellant's seventeenth and nineteenth assignments of errors.~~

VI.

A HIGHWAY ACQUIRED BY PRESCRIPTION OR LONG USE IS MERELY OF THE WIDTH ACTUALLY USED FOR AND AT THE END OF THE PRESCRIBED PERIOD OF TWENTY YEARS.

In a New Hampshire case the court held that—

"Evidence of *wheel tracks* is relevant to the question of where the usual travel on a highway is, and competent to show *the limits of a highway established by use.*"

Plummer *vs.* Ossipee, 59 N. H., 55.

Mr. Elliott, in his work on Roads and Streets, says:

"If the right to the way depends solely upon user, then the *width* of the way and the *extent* of the *servitude* is measured by the character of the user, *for the easement cannot be broader than the user.*"

Elliott on Roads, p. 136.

"A highway by user *includes only so much land as is used for that purpose,* and *it cannot be extended* upon adjacent lands, against the consent of the owner, *except under proper proceedings for condemnation for that purpose.*"

Scheimer *vs.* Price, 65 Mich., 639.

"Where a right of way is proved to exist by adverse use and enjoyment only, *the common and ordinary use which establishes the right, also limits and qualifies it.*"

Cahill *vs.* Layton, 57 Wis., 611.

So in a Missouri case the court of appeals of that State held, as to a public road acquired by prescription merely, that "its *width* would have been determined and fixed *by the actual travel and use by the public.*"

Ehret *vs.* Kansas City R'y Co., 20 Mo. App., 262.

The supreme court of Indiana say:

"A road which by 20 years' use becomes a public highway, is of no established width by law, but *the width as used at the end of 20 years,* cannot be legally intruded upon by any one."

Epler *vs.* Niman, 5 Ind., 460.
Hart *vs.* Trustees, 15 Ind., 227.

Mr. Washburn, in his work on Easements, says:

"It may further be remarked that, where a way is claimed by prescription, the *character and extent* of it is fixed and determined *by the user under which it is gained.* 'The *extent of a usage* of a way is evidence only of a right *commensurable with the use.*'

"No time of enjoyment *less than the term of prescription* (20 years) can give one a right of easement in the land of

another, or raise any presumption in favor of such a right. * * * There must, moreover, be what answers in law to an *actual* enjoyment, in order to create a prescription. * * * *Prescription acquires for the possessor precisely what he has possessed, but nothing beyond that.* * * * And in proving a prescription the *user* of the right is the *only* evidence of the *extent* to which it has been acquired."

Washburn on Easements, 4th ed., pp. 135, 149, 150; * pp. 72, 85, 86.

"The use must correspond with and be commensurate with the claim of right."

The State *vs.* Welpton, 34 Iowa, 144, 146.

"If a road or way be established by prescription *or user*, the *public use* defines the *extent* of the easement."

Walker *vs.* Caywood, 31 New York, 63.

In a case tried in 1823 the width and extent of a highway was attempted to be proved by a report of a town committee laying it out in 1713, with proof that it was the highway in controversy, and that travel had ever since 1713 been on some parts of it. The committee's report was held inadmissible, because the town had no power then to lay out highways and because said report was not shown to have been accepted by the town. The prescriptive or long use from 1713 to 1823 then being relied on, the court said:

"The public have *never used* the highway, *commensurate* with the above report, but *the travel has only been on some parts of it.* * * * The *use of some parts* of a tract of ground claimed to be a highway is proof of only that *those parts* of it are, or were ever intended to be, a highway. * * * The disseisin, in this as in other cases, must be construed strictly, and the right of the disseisor be limited, by his actual occupation."

Watrous *vs.* Southworth, 5 Conn., * 309, 311.

A town drain upon defendant's land had been used for 20 years, but during those years had been *enlarged* and

deepened. Plaintiff had a drain from his cellar into such town drain afterwards enlarged and deepened, as aforesaid, and subsequently deepened his cellar and drain and entered the altered town drain. The court held:

"1st. The town cannot acquire such right, as against the owner of the land, by using the drain less than 20 years *after it is thus enlarged and altered.*

"2nd. Plaintiff cannot acquire a right thus to drain his cellar, by a use of the town drain for less than 20 years *after it is altered.*"

And in its opinion the court says:

"Nothing short of an acquiescence of the defendant *for* 20 *years, in such an alteration,* would authorize the presumption of a grant, either in favor of the town or the plaintiff."

Cotton *vs.* Pocasset Mfg. Co., 13 Metc. (Mass.), 429, 433.

PLAINTIFFS' FOURTH PRAYER, granted by the court, is as follows:

"The jury are instructed that the right to an easement of common and public highway acquired by prescriptive use or long use of the road is confined to the lines and width of the road as actually used for and at the end of the period of 20 years, and does not extend to a greater width beyond the width of the road so actually used, and in this connection the jury are further instructed that the planting or placing of the boundary stones mentioned in the evidence, if the same occurred within 20 years before the acts complained of, which are in evidence, would not extend such easement by prescription beyond the lines and width of such actual use" (Rec., pp. 40, 41).

In short, the width of such a highway is not its width at the beginning *merely* or at the end *merely* or during any intermediate portion *merely* of such 20 years' use, but is such width as has been used for or during the *whole* and *entire* period of such 20 years' use.

That portion of this prayer relating to *width* of such highway has just been considered *supra.* The authorities

so clearly and fully support it that no more need be said on that subject.

The balance of this prayer relating to the boundary stones is equally correct and proper, in view of the evidence in this case.

Defendant's witness, J. Enos Ray, testifies he was supervisor of highways from 1869 until the levy court was legislated out of office, in 1871. He also testifies that in 1867 or 1868 levy court boundary stones were planted along Harewood road by B. D. Carpenter, county surveyor, and his son-in-law, Mr. Martin, under the authority of the levy court; that the *width* of Harewood road *as used* was 25 *feet*, and that the *width* of said road *as indicated by said levy court boundary stones* was 33 *feet* (Rec., p. 34).

Defendant's witness, George N. Beale, superintendent of county roads and supervisor of highways from J. Enos Ray's time to the present time, testifies:

"Harewood road *as used* was but 25 *feet wide*, maybe not so wide as that. * * * In making this cut or excavation in 1880 and 1881 we *widened* Harewood road from what it was as actually laid out *to the L. C. stones*. *We cut up to the levy court stones*, and that made a *width* of road of 33 *feet*. *Before that it was not over* 25 *feet*. *Witness never knew it to be over* 25 *feet, and wouldn't say it was as much as* 25 *feet* before the District cut it out in 1880 and 1881. After they cut it out, cut it and took away the gravel, it was a road of 33 *feet* (Rec., p. 37).

Such is appellant's evidence on the subject.

The evidence on behalf of appellees is as follows:

"That said lane or road (Harewood road) down to the close of the war was so narrow that two carriages could not pass one another without one of them turning out of the roadway to let the other go by, and that at the time of the acts complained of, in 1880, its traveled track or roadway *as used* was not over *from* 20 *to* 25 *feet at most*" (Rec. pp. 23 & 22).

"That between 1866 and 1868 boundary stones, marked 'L. C.,' were placed along said road, about 33 *feet apart*, from

one side to the other and *beyond the width of the road-bed as used* through the lands of the plaintiffs' testator, by the late levy court of the District of Columbia, but that neither *plaintiffs* nor their *testator* in his lifetime *ever recognized* the right of any one to plant said stones; that *plaintiffs* and their *testator dug up* some of said stones for whatever purposes he or they desired" (Rec., p. 25).

"That *no grant or dedication* was ever made of a right of way or easement to the public over said Harewood lane or road, and no condemnation thereof was ever made" (Rec., p. 22).

"*That when the levy court stones were so placed along Harewood road no steps were taken by the public authorities to condemn the road or to acquire any right therein*" (Rec., p. 25).

Appellees also gave evidence—

"That the said stones marked 'L. C.,' on the side of Harewood road where the said cut or excavation was made, *stood several feet inside of testator's fences*, and that in making said cut and excavation testator's said fences were undermined and fell down as the work was being done, and the digging was continued *inside the line of said fences up to said levy court stones*, the face of said stones being exposed down to the bottom of said stones, and that the stones did not fall until long afterwards from the action of the frost" (Rec., p. 32).

It is self-evident that the mere planting of stones by the levy court between 1866 or 1867 and 1868 beyond the maximum width of the road *as used* and within testator's fences—*within his inclosure*—could not operate so as to deprived testator of land beyond the width of said road *as used*, and certainly could not deprive testator of land *within his fences or inclosure*, which had never at any time been used as a road by the public or by any one whomsoever.

We submit that plaintiffs' fourth prayer was properly granted by the court, ~~and that there is nothing in appellant's fourth assignment of errors.~~

DEFENDANT'S ELEVENTH PRAYER as respectively asked and granted is as follows:

"If the jury shall find from the evidence that for a period of more than 20 years prior to 1880 the public enjoyed adversely and uninterruptedly as against the plaintiff's testator and all other private owners the use of Harewood road for all the purposes of a public highway of such width as the jury may find from the evidence accompanied the use of that road, and that thereafter the defendant excavated such part of said road of such width as they may find from the evidence to have been used, as aforesaid, by the public within said road, then the jury are instructed that the defendant had the right to excavate and grade said road *to the width it had been so used* so as to make it safe and convenient for public travel and carry away the gravel and soil taken therefrom and use the same in the repair and improvement of other roads in the District of Columbia connected with said Harewood road [and the plaintiffs are not entitled to recover in this action]." (Rec., p. 46.)

The italicized words "*to the width it had been so used*" were inserted by the court, and the bracketed words "and the plaintiffs are not entitled to recover in this action" were struck out by the court (Rec., p. 44, note; Rec., p. 46).

We have already pointed out and shown that the width of a public road or highway acquired by prescriptive use or long use of the road is confined to the lines and width of the road as actually used for the full and entire period of 20 years, and does not extend to a greater width beyond the width of the road so actually used. The court rightly and properly, therefore, inserted the italicized words "*to the width it had been so used*," as contained in the prayer as granted.

The uncontradicted evidence in this case showed that the trench and excavation made by the defendant was at least 8 feet wider than the maximum width of the road as used, and extended at least that much beyond the greatest extent or width of road, used at the time of the commission of the trespasses complained of, or that had ever been used (Rec.,

pp. 23, 25), and extended or reached several feet into testator's enclosure beyond and within his fences (Rec., p. 32). Such being the undisputed and uncontradicted evidence, the plaintiffs were certainly entitled to a recovery for such trespasses upon testator's land beyond the width of said road. It would unquestionably have been clear error to have concluded said prayer by instructing the jury that plaintiffs were not entitled to recover, and so the court rightly and properly struck out of said prayer the bracketed words "and the plaintiffs are not entitled to recover in this action."

We submit that there is no error in, and appellant is not injured or prejudiced by, the court's rulings or action concerning defendant's eleventh prayer, ~~and that there is nothing in appellant's twentieth assignment of errors.~~

DEFENDANT'S THIRTEENTH PRAYER, which was refused, is as follows:

"The jury are instructed that there is no evidence in this case of any adverse claim or act by the plaintiffs' testator in respect of Harewood road which in any way interferes with or defeats the right of the public in said road as a public highway" (Rec., p. 46).

According to the record, said testator paid taxes assessed upon the land within the limits of said road as private property (Rec., pp. 23, 25); said road was not repaired or recognized by the public authorities till after our civil war—after 1865 (Rec., pp. 23, 26); testator's gate-posts were maintained across said road, one on each side thereof, down to some time in 1861, after the late civil war had commenced (Rec., p. 22), and ordinary superficial repairs to said road merely were made by the public authorities after 1865, when such repairs accorded with testator's ideas, but even such repairs were *prevented* by him when not in accord with his desires or views (Rec., p. 26); said testator stopped the work of men

employed by the supervisor of county roads, who were making ridges across the road to drain water across it from the south side to the north side of the road, and objected to the same, and made the supervisor of highways remove said ridges (Rec., pp. 23, ~~24~~); both said testator and plaintiffs dug up some of said levy court stones for whatever purposes he or they desired (Rec., p. 25); said testator built a stone wall several hundred feet long within the limits of said road (Rec., p. 22), and other acts of ownership over the land within the limits of said road were exercised by the plaintiffs' testator from May 15, 1857, to his death, on January 31, 1884 (Rec., p. 22).

With such evidence as this before the jury, we submit that the court would have erred in granting and was clearly right in refusing defendant's thirteenth prayer, ~~and consequently there is nothing in appellant's twenty-second assignment of errors.~~

VII.

STATUTORY ROAD AND ITS ESSENTIAL ELEMENTS UNDER ACT OF MAY 3, 1862.

An act of 1862 enacts as follows:

"§ 2. That all roads within said county of Washington which have been *used by the public for a period of 25 years* or more *as a highway*, and have been *recognized by the said levy court as public county roads*, and *for the repairs of which the said levy court has appropriated and expended money*, are declared public highways, whether the same have been recorded or not."

"§ 3. That within one year from the passage of this act the levy court shall cause the surveyor of the said county of Washington to *survey* and *plat* all such roads as are named in the last-preceding section, and have the same *recorded* among the records of said county now used for recording surveys and plats of other public county roads; and, in

making said survey, the county surveyor shall follow, as nearly as possible, the lines and boundaries heretofore used and known as a highway, and he shall cause the lines and boundaries of the same to be permanently marked and fixed by the erection of stones or posts at the different angles thereof."

Act of Congress of May 3, 1862, ch. 63, §§ 2 and 3; 12 Stat. L., p. 383.

An act of 1863 enacts as follows:

§ 1. "That the period named in § 3 of said act of May 3, 1862, requiring that the roads designated in said section shall be *surveyed platted* and *recorded* within one year from the passage of said act, be extended to three years; and the levy court of said county of Washington is hereby authorized to cause the survey, platting and recording of such roads, in each year, as it may deem proper and necessary: *Provided*, That all of said roads be so *surveyed platted* and *recorded* within the period of three years."

Act of Congress of February 21, 1863, ch. 51, § 1; 12 Stat. L., p. 658.

And an act of 1864 enacts as follows:

§ 6. "That the time specified by an act of February 21, 1863, within which certain roads in said county shall be *surveyed, platted*, and *recorded*, is hereby extended to three years from the first day of July, 1865."

Act of Congress of June 25, 1864, ch. 157, § 6; 13 Stat. L., 193.

The following are each and all essential ingredients or elements of statutory highway under the statutory law quoted above, viz:

1st. That the road had been *used by the public for twenty-five years or more prior to May* 3, 1862—that is to say, *from May* 3, 1837, *or earlier, down to May* 3, 1862.

2d. That it had been used by the public during such prescribed period *as a highway*—that is to say, *not precariously*, but *adversely* and *under a claim of right.*

3d. That it had been *recognized* by the levy court as a public county road *prior to May* 3, 1862.

4th. That said levy court had *appropriated and expended money for its repair prior to May* 3, 1862.

If any of the foregoing ingredients or elements be wanting, the road certainly will not and cannot be a statutory highway under the foregoing law.

5th. In addition to these prerequisites, the road is required to be surveyed, platted, and recorded as a highway prior to July 1, 1868.

As to this last requirement, additional light is thrown upon the legislative intent of Congress by considering it in connection with prior and subsequent legislation upon the subject.

On February 27, 1801, Congress enacted:

"That the laws of the State of Maryland as they *now* exist shall be and continue in force in that part of the said District, which was ceded by that State to the United States, &c."

Act of Congress of Febr'y 27, 1801, ch. 15, § 1; 2 Stat. L. 104, 105; R. S. D. C., § 92, p. 9; Compiled Statutes, ch. 39, § 2, p. 337.

Among the Maryland laws *then* (*i. e.*, on February 27, 1801) in force in the part of said District ceded by Maryland to the United States is the following Maryland statute:

"For the better ascertaining what is or shall be deemed public roads, Be it likewise enacted &c., *That the justices of the county courts shall set down and ascertain in their records, once every year what are the public roads of their respective counties.*"

Maryland act of 1704, ch. 21, § 3.

Next comes the act of Congress of July 1, 1812. The second section thereof empowers the board of commissioners

or levy court to lay out public roads "under the conditions hereinafter prescribed."

Section 3 prescribes for and requires condemnation proceedings, assessment of damages, and just compensation to the owner of the soil.

And then section 4 enacts as follows:

"That the board of commissioners or levy court, as soon as they shall have laid out, marked and opened a road, and complied with the foregoing provisions, *shall return the courses, bounds and plat thereof to the clerk of the county to be by him recorded* at the expense of the said court; and the said road, so laid out and returned, as aforesaid, shall be *thereafter* taken, held and adjudged, a public road and common highway."

Act of Congress of July 1, 1812, ch. 117, § 4; 2 Stat. L., 771.

Next came the act of May 3, 1862, and its supplements referred to above.

At the passage of the act of May 3, 1862, the courses, bounds, and plat of all public highways laid out under said act of July 1, 1812, were undoubtedly of record in the county court, for it is only *after* this has been done that said act of 1812 declares them to be public highways. This was as a condition precedent to their becoming highways under that act. It only had to be done that one time, however, and not every year. Such was the case as to highways acquired under said act of 1812. That act had no application to highways acquired by prescriptive use or long adverse use, which, however, were covered by the act of 1704, ch. 21, § 3, *supra*, and by its terms were required to be set down and ascertained as public roads by the justices of the county courts in their records once every year. It is not improbable that in this annual recordation roads of this kind sometimes were overlooked and not so recorded, and, as we shall see hereafter, the courts held that such roads, if not recorded as required by law, were not public high-

ways. Under such circumstances, doubt and confusion must have arisen and evidently existed as to whether some of these roads were or were not highways.

In passing the act of May 3, 1862, *supra*, Congress evidently intended thereby and for all time to settle these difficulties and to remove this cause of confusion. It declared all roads coming up to and answering to the description contained in § 2 of said act of May 3, 1862, to be highways, whether the same had been recorded or not, and thereby dispensed with the necessity of their previous annual recordation under said act of 1704, ch. 21, § 3, but at the same time recognized the fact that they should certainly be surveyed, platted, and recorded once, at any rate, in the same records with and in the same manner as other highways, so that every one would know or could ascertain that they were highways. Accordingly, § 2 of said act of May 3, 1862, required all such highways within one year to be surveyed, platted, and recorded in the county court.

We submit that the manifest object and intention of Congress was that the public authorities should speak then or forever hold their peace; that within the time allowed them for so doing they should act as required and directed by the statute to do, or forever stand aside and assert no future claim of such then existing highway; that with the facts before them and fresh in their knowledge they must, within the time allowed them, survey, plat, and record all such roads as answered to the conditions and requirements of this act, or leave posterity to assume, when witnesses might be dead and evidence might be lacking, that roads not surveyed, platted, and recorded during the prescribed time were not entitled to be.

If such was not the object and intent of Congress why did the act limit a time within which this should be done; why by the supplemental act of February 21, 1863 (12 Stat. L., 658), extend that limitation from one year to three years, and by still another supplemental act of June 25, 1864

(13 Stat. L., 193), still further extend the limitation to July 1, 1868? What other satisfactory explanation is there of these successive extensions unless Congress considered and intended that when the ultimate period of limitation for so surveying, platting, and recording such roads expired that the public authorities were to be precluded from claiming any road as a highway by prescriptive use or long adverse use prior to May 3, 1862, if not surveyed, platted, and recorded, as required by these statutes.

We submit that the object and intention of Congress undoubtedly was to put the public authorities to an election to survey, plat, and record all such then existing prescriptive roads within the ultimate time prescribed, or else to abandon them, and that only such of the then existing roads of this kind as were so surveyed, platted, and recorded should be recognized or treated thereafter as public highways.

Congress subsequently passed the following statute, which confirms our construction of the act in question:

"Any person who, without lawful authority, shall obstruct the free use of any of the public highways which have been used and recognized as public county roads for 25 years prior to May 3, 1862, *and which were thereafter duly surveyed, recorded, and declared public highways according to law*, shall be subject to a fine for each offense of not less than $100 nor more than $250 and be imprisoned till the fine and the costs of suit and collection of the same are paid."

R. S. D. C., ch. 11, § 269, p. 31, approved June 22, 1874; Compiled Statutes, ch. 29, § 24, p. 269.

We submit that the act of May 3, 1862, and its supplements, *supra*, when taken in connection with the prior legislation to which we have referred and with said § 269, R. S. D. C., shows that no right of public highway by prescription or by long adverse use, &c., prior to May 3, 1862, can be maintained in this District if such highway is not surveyed, platted, and recorded under and in accordance with the provisions of said act of May 3, 1862, and its supplements, *supra*.

In this connection it only remains to say that from May 3, 1862, to the commission of the trespasses complained of in 1880 and 1881 is only 18 or 19 years, and consequently is less than the prescriptive period.

Let us now consider the other elements of statutory highway:

If 25 years' use *prior to May* 3, 1862, is not established—that is to say, if *less* than 25 years' use *prior to that time* be only proved—the required period of user for such *statutory* highway cannot be made up from, or eked out by, proof of any length of *subsequent user after May* 3, 1862.

The statutory *recognition* by the levy court of the road as a public county road must likewise have been *prior to May* 3, 1862. No recognition *subsequent to May* 3, 1862, bears upon or tends to prove such a *statutory* highway. So, too, the statutory *appropriation and expenditure of money* by the levy court for the repair of the road must have been *prior to May* 3, 1862. No appropriation or expenditure of money by the levy court for repair of the road *after that time* bears upon or tends to prove such a *statutory* highway. All this is clear from the express terms of the statute of May 3, 1862, quoted above.

It is perfectly clear that the act of May 3, 1862, would be unconstitutional and void unless the previous public use of the road were *adverse* and *under a claim of right*. Otherwise it would manifestly be a taking of private property for public use without just compensation, and would fall directly within the prohibition of the Constitution. This would be so even were the statute silent as to the character of the user.

The Supreme Court of the United States speaking on this subject say:

"Possession, to give title, must be *adversary*. The word is not, indeed, to be found in the statute; but the plainest dictates of common justice require that it should be implied. It would shock that sense of right which must be felt equally by legislators and by judges, if a possession which was *per-*

missive, and entirely consistent with the title of another *should silently bar that title.* Several cases have been decided in this court, in which the principle seems to have been considered as generally acknowledged; and in the State of Pennsylvania particularly, it has been expressly recognized. To allow a different construction, would be to make the statute of limitations a statute for the encouragement of *fraud*—a statute to enable one man to *steal* the title of another by professing to hold under it. *No laws admit of such a construction.*"

Kirk *vs.* Smith, 9 Wheaton, 288.

By the express terms, however, of the statute under consideration the road must have been used by the public for the prescribed length of time "*as a highway,*" which is only another way of saying that an *adverse* user *under a claim of right* is requisite.

In Mayberry's case it was contended in the court below that the public use of the road for more than 20 years without any interruption by the owners of the land over which it passed was sufficient evidence that it was a legal highway. In the court above it was contended that the jury should have been instructed that proof of the public use of the way *as a highway* for more than 20 years without any interruption by the owners of the land over which it passed is sufficient evidence that it was a legal highway, &c.

The appellate court say:

"It must not be overlooked that a new element is here introduced into the doctrine contended for at the trial, and into which the ingenious counsel occasionally slides in his argument here, when he contends that 20 years' permissive use shows a dedication, &c. * * * At the trial it was claimed, &c., that such a use as was indisputably proved, *i. e.*, an actual, frequent use of the road, &c., by all and sundry who had occasion to go there, continued for a period of 60 years or more, as the witnesses testified, and not prohibited by the owners of the land, was of itself sufficient, &c. * * * But such use might be *permissive merely;* and when counsel comes to state the legal proposition which he claims to be correct, he qualifies his original position

thus: 'The public use of the way *as a highway* for more than 20 years without interruption, &c., is sufficient evidence that it was a legal highway, &c.' * * * Now the use of the way *as a highway*, excludes the idea of *permissive* use. It is a use which *all claim as a right.* If we assume, then, as plaintiffs' counsel would have us, that the public use of the way, *as a highway*, for more than 20 years, without any interruption by the owners of the land over which it passed, is sufficient evidence that it was a legal highway, &c., * * * it is evidently necessary, in order to avoid misleading the jury by such a statement, to call their attention to the distinction between the use of the way, '*as a highway*,' and a use which might be merely *permissive.*"

Mayberry *vs.* Inhabitants of Standish, 56 Me., 349, 350.

We submit that, in addition to the other essential elements to which we have referred, *adverse* and uninterrupted use of Harewood road *by the public under a claim of right* for the full period of *25 years* prior to the passage of the act of May 3, 1862, is absolutely essential in order to establish it as a statutory road under the law quoted above. This proof of such adverse user must extend back as far as May 3, 1837.

We submit that such evidence is not found in the record, and that the requisite proof to establish such a statutory road, even as a *prima facie* case, was wanting, and that the question of statutory road should not have been submitted to the jury at all.

The record says defendant gave evidence tending to prove "that Harewood road, through the lands of plaintiffs' testator, has been continuously used by the public as a county road *from 1848* down to the time of the alleged trespasses" (Rec., p. 32).

And that defendant's witness Theodore Sheckels gave evidence tending to show "that he had known Harewood road *since 1848*, at which time it appeared to be a public

road and was a public road to all intents and purposes" (Rec., pp. 36, 63).

This lacks 11 years of reaching back to the required time, 1837. The record further says that defendant's witness George N. Beale gave evidence tending to show "that he had known what is now Harewood road for 55 years (which would be from 1843); that he was taken along that road to Rock Creek church to be christened; * * * that it has been a county road, considered so—a public road—ever since witness knew it" (Rec., p. 36). The observation of a child when taken to be christened is not the best evidence; but ignoring this fact, his testimony still lacks 6 years of reaching back to the required time, 1837.

The record also says that defendant's witness, John W. Ray, gave evidence tending to show that as a boy, *40 or 45 years ago*, he used to travel what is now Harewood road daily tending his father's cattle" (Rec., p. 35). This carries him back to 1858 or 1853, and so lacks from 16 to 21 years of reaching back to the required time, 1837.

The record further says that defendant's witness, J. Enos Ray, testified "that *before the late war old man Enos Ray* (witness' father), *as supervisor of county roads*, performed work on Harewood road and repaired it as other public roads were repaired and kept in order; that the cost of repairs upon Harewood road by the said Enos Ray were paid for at different times as the work was done by said levy court" (Rec., p. 34). This witness does not pretend to say *how long before the war* anything of this kind occurred.

Giving full weight to all that this witness says, it only goes back to 1861. It cannot be said that he proves anything of the sort to have been done at an earlier date than that. He certainly fails altogether, by many long years, to reach back to the required time, 1837. The record also states that defendant's witness, Tobias Talbott, says:

"That *old man Enos Ray, now deceased*, who said Talbott knew very well, was the supervisor of county roads in the Dis-

trict of Columbia *from* 1840 *down to the time of the late war*; that said Talbott (who in those times worked for Mr. George W. Riggs and lived west of John Agg, upon the adjoining place, which was then owned by George W. Riggs and now being the Soldiers' Home grounds) never saw *old man Enos Ray* working this Harewood road" (Rec., p. 33).

This clinches the fact that what J. Enos Ray testified took place before our civil war, whilst his father, *old man Enos Ray*, was supervisor of county roads, *could not have been earlier than* 1840, because Talbott proves that *old man Enos Ray was not supervisor of roads before* 1840, and may not have been earlier than the first part of 1861. In any view of the case, it falls far short of reaching back to the required time, 1837. Moreover, the record expressly states that the defendant gave evidence tending to prove that "*this use* (the use of Harewood road) *prior to* 1861 *was more or less confined to people living on farms in the neighborhood*" (Rec., p. 33). This is only another way of saying that prior to 1861 Harewood road was not used by people generally as a public road, but only by neighbors as a mere neighborhood road. The evidence of defendant's witness, James Johnson, shows even more clearly that Harewood road was not used by the general public, but merely by the few farmers living upon it in early days. He, James Johnson, testifies as follows:

"Witness had known what is now called Harewood road since 1835; that everybody *living along the road used it* as they did all other county roads; that *in* 1835 *there were only* 2 *or* 3 *farms along the line of the road, and the people from those farms used to travel what is now Harewood road*" (Rec., pp. 34, ~~35~~).

This is the testimony of the only one of defendant's witnesses who reaches back to the required time, and he, instead of proving that Harewood road was then used adversely by the public under a claim of right, proves just

the reverse, and affirmatively shows that it was then merely used by the owners of 2 or 3 farms through which it ran.

Not only has appellant failed to prove the essential elements of a statutory road under the foregoing law, as pointed out above, but appellees affirmatively disproved the same. As we have already had occasion in another connection to remark, appellees' evidence proved or tended to prove that said Harewood lane or road "was not a public road or highway" (Rec., p. 21); that no grant or dedication was ever made or recorded of a right of way or easement to the public over said lane or road, and no condemnation thereof was ever made (Rec., p. 22); "that said lane or road commenced at the southerly end of the common boundary line between Turkey Thicket tract and Pleasant Hills tract, and ran northwardly for about half a mile along said common boundary line, half on James White Sr.'s Pleasant Hills tract, and half on Henry Duley's Turkey Thicket tract for this distance, and thence leaving and crossing said boundary line said lane or road ran in a northwestwardly direction over the "Vineyard" part of said Pleasant Hills tract to George W. Riggs' part of said Pleasant Hills tract, and thence continuing in a northwestwardly direction over said Riggs' part of said Pleasant Hills tract to the Rock Creek Church road" (Rec., p. 21); "that a much shorter route and much better grade could have been obtained had said lane or road been located so as to run more directly through the body of said Pleasant Hills tract instead of following, as it does, for so long a distance, the common boundary line between that tract and the Turkey Thicket tract" (Rec., pp. 21, 22); "that travel over said lane or road over testator's said land originated for the accommodation of some prior owner or owners of that tract and the adjoining tract or of one of said tracts and of those deriving title from or under such owner or owners of one or of both of said tracts" (Rec., p. 21); "that afterwards they *permitted* some of their neighbors to travel over said lane or road, and still later *permitted* others also to travel over it"

(Rec., p. 21); "that said lane or road down to the commencement of the civil war was but little used and very few people went along it or traveled it before the war" (Rec., pp. 22, 23); "that said lane or road down to the close of the war was so narrow that two carriages could not pass one another without one of them turning out of the roadway to let the other go by" (Rec., p. 22); "that taxes were assessed by the public authorities upon and paid by the owners of said 'Vineyard' tract upon the land within the limits of said lane or road" (Rec., p. 22); "that John Agg while he was in possession of said 'Vineyard' tract changed the location of part of said lane or road over that tract at his own expense, by his own paid employees, for the reason that he wished it further from his house" (Rec., p. 21); "that from 1842 to the time of the conveyance of May 15, 1857, to plaintiffs' testator, Conway Robinson, gates were maintained across said Harewood road, barring the same, by the owner or owners of said 'Vineyard' tract, or their tenants (Rec., p. 22); that the gate posts (one on one side of said road and the other on the opposite side of said road) of such gates continued to stand for some time after the gates themselves wore out or disappeared, and stood there until some time in 1861, after the late civil war had commenced" (Rec., p. 22), "and that said lane or road was *not repaired* or *recognized* by the public authorities until after the late civil war" (Rec., pp. 23, 26.)

This summary of appellees' evidence certainly shows that Harewood road was *not used adversely* by the public *under a claim of right* from May 3, 1837, to May 3, 1862; it shows that it was not so used during *any part* of that time; it shows that it was *not repaired or recognized* by the public authorities until *after* our late civil war—that is, *after* 1865.

We submit that both upon appellant's own showing and upon the whole evidence in the case the court should not have left the question of *statutory* highway to the jury at all but should have taken that question from the jury, because

the proof made out no *prima facie* case, even, of such *statutory* highway, lacking altogether proof of essential elements and ingredients of such *statutory* highway as we have just explained and pointed out.

DEFENDANT'S SECOND PRAYER, as respectively asked and granted, is as follows:

"If the jury believe from the evidence that the place where the alleged trespasses were committed is part of the road called the Harewood road in the District of Columbia, and that the said road had been used and recognized as a public county road for a period of 25 years prior to May 3, 1862, *adversely to the plaintiffs' testator and those under whom he claimed*, and that said road was, after said last-mentioned date and *prior to the 1st day of July, 1868*, surveyed and recorded in the records of the levy court as a public highway, then the [plaintiffs are not entitled to recover in this action, and the verdict should be for the defendant] jury should find that the said roadway is a public highway of the width that it had actually been used prior to May 3, 1862" (Rec., p. 44).

The italicised words were inserted by the court, and the bracketed words were struck out by the court, and as so modified by the court this prayer was granted (Rec., p. 44 and note).

We have already explained and pointed out in this chapter, *supra*, that the 25 years' *adverse* use was required to establish such a statutory highway. The court's insertion, therefore, of the italicized words "*adverse to the plaintiffs' testator and those under whom he claimed*" was certainly right and proper and in accordance with the requirements of the statute. We have also pointed out that such a statutory highway was required to be *surveyed, platted*, and *recorded* prior to July 1, 1868 (act of June 25, 1864, ch. 157, § 6; 13 Stat. L., 193). The court's insertion, therefore, of the italicized words "*prior to the 1st day of July, 1868*," was

certainly right and proper and in accordance with express requirement of the statute.

We have also pointed out and shown in chapter VI of this brief that by the uncontradicted evidence in this case the *maximum width* of Harewood road, *as used*, was not over 25 feet where the trespasses were committed, and never had been over that width, and that the trench and excavation complained of was 33 feet in width, extending at least 8 feet beyond the width of the road as used and extending several feet within testator's fences and enclosure.

Had the jury found Harewood road to be a *statutory* highway of the width it had been so used, it would not have justified the whole trespass, but only part thereof at most, and consequently it was entirely right and proper for the court to strike out the bracketed words, "plaintiffs are not entitled to recover in this action, and the verdict should be for the defendant." Those words unquestionably vitiated said prayer as asked. They operated to prevent a verdict for plaintiffs even for trespasses proved to have been committed beyond and in excess of the maximum width of any such statutory road as used.

This prayer is silent as to the *appropriation and expenditure of money* by the levy court *for repairs* of said road prior to May 3, 1862, though the same is an essential element of any such statutory road. In that respect it is, both as asked and as granted, too favorable to appellant. It is silent, too, as to the *platting* of said road, though the statutes direct such a statutory highway to be surveyed, *platted*, and recorded prior to July 1, 1868.

It is to be remembered, as we have already shown, that there was not sufficient evidence to warrant or justify the granting of this or any other prayer based upon the existence of such a statutory highway.

We submit that defendant's second prayer, as asked, was fatally defective; that the court's modifications were entirely proper; that appellant has certainly not been prejudiced by

the rulings concerning it, ~~and that there is nothing in appellant's twelfth assignment of errors.~~

DEFENDANT'S TWENTY-FIRST PRAYER is as follows:

"If the jury believe from the evidence that Harewood road on May 3, 1862, had been used by the public for a period of 25 years or more as a highway, and had been recognized by the levy court of said county as a public county road, and the said levy court had platted and recorded the same and had appropriated and expended money for the repairs of said road, and that the defendant in making the excavation complained of confined its operations within the lines of the road as marked by the said levy court, then the plaintiffs are not entitled to recover and their verdict should be for the defendant" (Rec., p. 45).

This prayer was properly refused by the court. The prayer relies upon and attempts to define a statutory highway under the act of May 3, 1862, and its supplements, *supra*, but is faulty and bad for the following reasons, viz:

1st. It is not clear, but ambiguous, as to the necessity of the levy court's *recognition* of the road as a public county road being required to be, *not after*, but *before May* 3, 1862, and is calculated to confuse the jury as to that question.

2d. It is not clear, but ambiguous, as to the necessity of the levy court's *appropriation and expenditure of money for the repairs of said road* being required to be, *not after*, but *before May* 3, 1862, and is calculated to confuse the jury as to that question.

3d. It is not clear, but ambiguous, as to the statutory direction that such statutory highway be surveyed, platted, and recorded, *not after*, but *before July* 1, 1868, and is calculated to confuse the jury as to that question. It is wholly silent as to the *surveying* of said road, though the statutes direct such a statutory highway to be *surveyed*, platted, and recorded prior to July 1, 1868.

4th. The fatal objection to and defect in defendant's twenty-first prayer grows out of the fact that (the other conditions of said prayer existing) it instructs the jury that if the "defendant, in making the excavation complained of, confined its operations within the lines of the road *as marked by the said levy court*, then the plaintiffs are not entitled to recover and the verdict should be for the defendant" (Rec., p. 47).

We have already shown in chapter VI of this brief that the width of a highway established by prescriptive use or long use is confined to the lines and width of the road as actually used for and at the end of the period of 20 years, and does not extend to a greater width beyond the width of the road so actually used. We have also shown in this chapter of this brief, *supra*, that a statutory highway under the act of May 3, 1862, is only established by an adverse use thereof by the public for the full period of 25 years. In the case of a mere *prescriptive* highway the period of adverse use is only 20 years; in the case of such a *statutory* highway the period of adverse use is 25 years by the express terms of the statute. The width of the highway in the one case depends upon and is governed by the same principle as in the other, namely, that the extent of the user determines the extent or width of the highway. In chapter VI of this brief we reviewed and quoted the evidence upon this question and showed that by the undisputed and uncontradicted evidence the maximum width of Harewood road as used was not when the trespasses were committed and never had been over 25 feet in width; that the levy court, without any condemnation then or at any other time, planted its boundary stones marked "L. C.," not along the lines and boundaries of said road as theretofore used, but at least 8 feet beyond and in excess of the width of said road as used and several feet within testator's fences and enclosure, upon ground which, on the proof, cannot be pretended to have ever been used

as a road at all by the public or by any one whomsoever; that Harewood road was so marked by the levy court between 1866 or 1867 and 1868, and that the trench, excavation, and trespasses complained of were made and committed in 1880 and 1881.

In 1880 and 1881 the defendant, in making the trench and excavation complained of, cut out Harewood road to the full width of 33 feet, cutting up to these "L. C." stones and cutting at least 8 feet beyond the width of said road as used and cutting several feet within testator's fences and enclosure.

Surely upon such uncontradicted proof it would be clear error to instruct the jury, as asked in defendant's twenty-first prayer (even if the other conditions of said prayer existed) that if the "defendant, in making the excavation complained of, confined its operations within the lines of the road *as marked by the said levy court*, then the plaintiffs are not entitled to recover, and the verdict should be for the defendant" (Rec., p. 47). Plaintiffs certainly were entitled to recover something for acts and trespasses confessedly committed *beyond the maximum width of such road*. We submit that there was no error in refusing defendant's twenty first prayer, ~~and that there is nothing in appellant's twenty-sixth assignment of errors.~~

DEFENDANT'S TWENTIETH PRAYER, as respectively asked and granted, is as follows:

"If the jury believe from the evidence that Harewood road was on May 3, 1862, a road within the county of Washington, in the District of Columbia, which had been used by the public *adverse to the plaintiffs' testator and those under whom he claimed* for a period of 25 years or more as a highway, and had been recognized by the levy court of said county *prior to that date* as a public county road, and the said levy court had appropriated and expended money for the repairs of said Harewood road, then they are instructed that the said Harewood road was at the time of the alleged trespass complained

of a public highway, *of the width it had been used*, although the same may not have been recorded " (Rec., p. 47).

The italicized words in this prayer were inserted by the court, and said prayer, as so modified, was granted (Rec., p. 44, note, and Rec., p. 47).

We have already pointed out and shown in this chapter *supra*, that the 25 years' public use must be *adverse* to the land-owner to establish such a statutory highway under said act of May 3, 1862, and consequently it was clearly right and proper for the court to insert the italicized words "*adverse to the plaintiffs' testator and those under whom he claimed.*" We have also pointed out and shown that by the terms of said statute the levy court's *recognition* of the road as a public county road had to be *prior* to the passage of said statute of May 3, 1862, and consequently it was clearly right and proper for the court to insert the italicized words "*prior to that date,*" as contained in the prayer as granted. We have just pointed out and shown, too, in this and the preceding chapter of this brief that the width of such statutory highway is confined to the lines and width of the road as adversely used by the public for the whole statutory period of 25 years. The court, therefore, was entirely right and justified in inserting the italicized words "*of the width it had been used,*" as contained in the prayer as granted.

This prayer is silent as to the time when appropriation and expenditure of money by the levy court for repairs of said Harewood road must occur to establish it as such a statutory highway. By the statute it had to be *before* the passage of said act of May 3, 1862. By this prayer it might be considered and acted on by the jury, *though after that time.* This prayer as granted was too favorable to appellant. We submit that appellant was in no way injured or prejudiced by the rulings of the court upon or concerning defendant's twentieth prayer, ~~and that there is nothing in appellant's twenty-fifth assignment of error~~.

DEFENDANT'S TWELFTH PRAYER, as respectively asked and granted, is as follows:

"[The levy court of the District of Columbia was a corporation. Its duty, among other things, was to supervise and keep in repair the public roads of the county of Washington and to plat, record, and mark with boundary stones such roads.] If the jury find from the evidence that boundary stones were placed along Harewood road and at the point of the alleged trespass by the surveyor of the levy court in 1865 or thereabouts, and that thereafter said levy court worked and kept said road in repair, then [in the absence of evidence to the contrary the presumption is that] *it is a question for the jury to determine whether* said levy court caused said road to be surveyed, platted, and recorded as a public highway in accordance with the act of Congress [requiring the same to be done, and such presumption is not overcome by the fact that the record of the survey and plat of said road is lost or cannot be found], *and it will be competent for them to so find if all the evidence establishes the fact to their satisfaction, although no record of a survey and plat of said road has been given in evidence*" (Rec., pp. 46, ~~47~~).

The words in brackets were struck out by the court, and the italicized words were inserted by the court, and as so modified this prayer was granted (Rec., p. 44, note, and Rec., pp. 46, ~~47~~).

The bracketed language at the commencement of this prayer was a mere abstract proposition of law and objectionable on that account. Appellant contends that in the absence of evidence to the contrary the presumption was that the levy court had surveyed, platted, and recorded Harewood road. On the other hand, we contend that, every statutory prerequisite essential to warrant or justify their doing so having been disproved, the presumption would be just the other way. The record, however, contains the following direct affirmative evidence upon this subject, viz:

"That said lane or road (Harewood road) *was never surveyed, platted, or recorded as a public road or highway, as required by law*" (Rec., p. 21).

With this direct and affirmative proof in the case the court rightly and properly struck out the bracketed words "in the absence of evidence to the contrary the *presumption* is that," because instead of an *absence* of evidence to the contrary there was the *existence* of clear evidence to the contrary. The ground for and basis of any such *presumption* being completely met and removed by evidence in favor of appellees, the court with equal propriety struck out the bracketed words "requiring the same to be done, and such presumption is not overcome by the fact that the record of the survey and plat of said road is lost or cannot be found," and inserted in lieu thereof the italicized words "*and it will be competent for them to so find if all the evidence establishes the fact to their satisfaction, although no record of a survey and plat of said road has been given in evidence,*" as shown in said prayer as granted (Rec., p. 46).

Moreover, the court, in its charge, read to the jury defendant's second and twelfth prayers as granted, and immediately thereafter instructed them further upon the subject as follows:

"That is to say, *you may find that there was a record of it,* if you believe from all the evidence one was made, *although none has been given in evidence.* In that connection, I call your attention to the three maps which were admitted in evidence, and call your attention to the fact upon that point and the effect it would give to those maps. 'The maps introduced in evidence are not such surveys and records as the act of 1862 contemplated, but may be considered, together with all the other evidence in the case bearing upon the point, *in determining whether such survey and record was made*'" (Rec., p. 47).

The court, in its charge, then read to the jury defendant's twentieth prayer as granted, and immediately thereafter instructed them further upon the subject as follows:

"In other words, upon that question of whether there was a road there in 1862 you may find that there was one if you

find the facts supposed in these instructions, if you believe it was *platted and surveyed*, and you may find that *without having the plat or survey offered in evidence* if you believe it existed and was actually done, and the last instruction goes further and says you may find it *to have been a public road*, and *to be a public road*, if you find those facts existed, *although it was never platted and recorded*, if it was *used* as supposed in those instructions" (Rec., p. 50).

We fail to see how appellant is injured or in any way prejudiced by the court's declining to instruct the jury peremptoriiy to presume Harewood road was surveyed, platted, and recorded as required by law, when there was direct affirmative proof before them that it "*was never surveyed, platted, or recorded as a public road or highway, as required by law*" (Rec., p. 21). To tell them they must presume anything of that kind in the teeth of such evidence would have been to invade the province of the jury.

Secondly, we fail to see how appellant is injured or in any way prejudiced by the court's ruling in this matter, when the court immediately thereafter instructs them as to the immateriality of said road being surveyed, platted, and recorded, and tells them that if they find it was *used as supposed* in those instructions they may find it to have been and to be a public road, *although it was never platted and recorded at all.*

Moreover, defendant's second, twelfth, and twentieth prayers should all have been refused *in toto*, because, as pointed out in this chapter, *supra*, there was a want of and an absence of proof of the essential ingredients and elements of such a *statutory* highway.

We submit, therefore, that appellant is in no way injured or prejudiced by the court's rulings concerning defendant's twelfth prayer, ~~and that there is nothing in appellant's twenty-first assignment of errors.~~

VIII.

AN INNOCENT PURCHASER FOR VALUE WITHOUT NOTICE TAKES LAND FREE AND CLEAR OF RIGHTS OF WAY OR EASEMENTS OVER THE SAME, WHICH ARE NOT DULY ACKNOWLEDGED AND RECORDED UNDER THE REGISTRATION ACTS.

An early Maryland act of 1715 enacts that—

"No lands, tenements *or hereditaments* whatsoever," within said province, "shall pass, alter or change, from one to another" whereby an estate of inheritance or of freehold or any estate for above seven years, shall be made or take effect in any person or persons, &c., "except the deed or conveyance by which the same shall be intended to pass, alter or change the same, *be made by writing indented and sealed*, and the same to be *acknowledged*, &c., and *recorded* within 6 months after the date of such writing indented as aforesaid," &c.

Maryland act of 1715, ch. 47, § 8.

An additional supplementary Maryland act enacts that—

"No estate of inheritance or freehold, or any declaration or limitation of use, or any estate for above 7 years, shall pass or take effect, except the deed or conveyance by which the same shall be intended to pass or take effect, shall be *acknowledged* in the provincial court or * * * in the county court, &c., and be also *enrolled in the records* of the same county, or the provincial court, as the case may be, within 6 months after the date of such deed or conveyance."

Maryland act of 1766, ch. 14, § 2.

This statutory law always has been and still is in full force and effect in this District.

Abert's Compiled Statutes, ch. 58, § 16, pp. 492, 493.

The court of appeals of Maryland, on various occasions, from early to modern times, has construed these laws and held that *a right of way* is an *hereditament;* that all the solemnities of *acknowledgment and recordation* required by said acts apply to and must be pursued as to rights of way as fully as to the land itself; that said act of 1715 applies to, embraces, and governs rights of way *in esse*, and that said act of 1766 applies to, embraces, and governs rights of way both *in esse* and *de novo*, and that its requirements as to *acknowledgment and recordation* must be pursued as to any such right of way. In the leading case upon the subject said court cite said acts of 1715, ch. 47, § 8, and 1766, ch. 14, § 2, and hold as aforesaid, concluding its opinion on the construction of said act of 1766, ch. 14, § 2, as follows:

"If we entertained even strong doubts as to what originally should have been the construction of this act of assembly (of which we have none) they would in a moment be removed by adverting to the single fact, which the whole land records of the State will demonstrate, that from the year 1767 to the present day, grants and conveyances of *de novo* rent charges, *rights of way* &c. have been as uniformly *acknowledged and recorded*, as deeds conveying the land itself."

Hays *vs.* Richardson, 1 G. & J. (Md.), 369, 370, 376 to 385.

The decision in this case is approved and affirmed in the following cases, viz:

Addison *vs.* Hack, 2 Gill (Md.), 228, 229.
Mitchell *vs.* Seipel, 53 Md., 276.
S. P., Foster *vs.* Browning, 4 R. I., 50, 51, 52.

The courts of Virginia and of West Virginia say:

"Where the deed conveys, without reservation, the grantee takes all conveyed by the deed unincumbered, unless in some way *notice is brought home to him* that the land is sold

subject to the incumbrance of some *easement* or *privilege* in another person, *or in the public*."

Deacons *vs.* Doyle, 75 Va., 262.
Patton *vs.* Quarrier, 18 W. Va., 454.
S. P., Pentland *vs.* Keep, 41 Wis., 499, 500, 501.

"Where there is a grant of land by metes and bounds without express reservation, and with full covenants of warranty against incumbrances, there is no just cause for holding that there can be any reservation by implication unless the easement is strictly one of necessity."

Washburn on Easements, 4th ed., 76.
S. P., Patton *vs.* Quarrier, 18 W. Va., 454.

In Harris' case the defendant was a purchaser for value of the land, which the State claimed was a public street because of its user as a way for persons, horses, and carriages and because a number of persons, living and dead, believed it to be a street. The court of appeals of Virginia say:

"The defendant ascertaining, by an examination of the records, that the lot had passed by deeds of conveyance and under decrees of the court from owner to owner, and had been regularly assessed with taxes, as private property; that it was enclosed as private property, and had been for many years; might justly and reasonably conclude, when he made the purchase, that no claim was asserted to a right of way over it; or if there ever had been such claim, it was then abandoned. If there ever had been, originally, a dedication of the property, it is a question worthy of consideration, whether the public, under the circumstances, would not be precluded from asserting it against the defendant. Having acquiesced, without objection, in the enclosure of the lot and the exercise of other acts of ownership on the part of those claiming title, and thus apparently abandoned all claim to the easement, and thereby induced the defendant to expend money upon the faith of such supposed abandonment, it would be gross injustice for the city of Norfolk, or its inhabitants, now to attempt to enforce such demand."

Harris *vs.* The Comm., 20 Gratt. (Va.), 842.
S. P., Scott *vs.* Bentel, 23 Gratt. (Va.), 8.

PLAINTIFFS' FIRST PRAYER, which was refused by the court, is as follows:

"The jury are instructed that a grant of a right of way or easement, unless duly acknowledged and recorded under the registration acts, is, like a grant of land itself, void as against any innocent purchaser for value without notice whose deed has been duly acknowledged and recorded under said registration acts" (Rec., p. 39).

The statutes and authorities to which we have referred, *supra*, sustain and establish this proposition, and show that it is good sound law. It was well supported by evidence, and was appropriate and pertinent to the controversy, and should have been granted. Its refusal was a great disadvantage to appellees and a corresponding advantage to appellant.

What was the condition of things when plaintiffs' testator, Conway Robinson, first purchased and acquired from John Agg's executor and devisee testator's interest in the "Vineyard" tract, and took possession thereof under deed of May 15, 1857, and what were the circumstances under which he did so?

The record (irrespective of and apart from other evidence of permissive or precarious origin and use of Harewood lane or road) shows that there was evidence "that said lane or road was *not repaired* or *recognized* by the public authorities *until after the late civil war*" (Rec., pp. 23, 26); "that *taxes* were *assessed* by the public authorities upon *and paid* by the owners of said tract called the 'Vineyard' or their tenants upon said tract of land as a whole, *including land within the limits of said lane or road*" (Rec., p. 22); "that those under whom plaintiffs' testator claimed had *paid taxes* upon this land and had been *assessed* as well for the land *included within the lines of Harewood road* as for the rest of the property" (Rec., p. 25); "that the *location* of part of said lane or road passing over said piece of land called the 'Vineyard' *was*

changed by said John Agg while he was in possession thereof for the reason that *he wished it* further from his house, and that *said John Agg employed and paid the hands who made this change*" (Rec., p. 21); "that there was a *fence* on the *south* side, but none on the *north* side *of said lane or road*, where it crossed said tract called the 'Vineyard,' and that there were *fences* on the *east and west boundaries* of said tract called the 'Vineyard,' and that there were such fences in Mr. John Agg's time, *before* and *after* he changed the location of part of said lane or road, within the limits of his said place called the 'Vineyard'" (Rec., p. 22); "that at the time testator purchased and acquired his interest in said 'Vineyard' tract and took possession thereof, under his said deed of May 15, 1857, there were *then* and *for the whole* 15 *years, from* 1842 *to May* 15, 1857, *had been* (in addition to a gate leading to Mr. Agg's house in said south fence and near Mr. Agg's house) *gates* maintained *across* said Harewood road, *barring the same*, by the owner or owners of said tract called the 'Vineyard,' or their tenants, where it *crossed* and left the *eastern boundary line* of said tract called the 'Vineyard,' and that on the *western boundary line* of said tract called the 'Vineyard' two gate posts stood, not in said south fence, but on *opposite sides* of said lane or road, so that said road *could not be traveled* through said tract called the 'Vineyard' *without passing through such western gate posts* and *without opening such eastern gate and going through the same*" (Rec., p. 22); "that said lane or road was never *surveyed, platted, or recorded* as a public road or highway, as required by law" (Rec., p. 21); "that the various owners of said tract of land called the 'Vineyard,' by mesne conveyances, conveyed the same from one to the other, *with covenants of warranty* and with *plats* annexed to some of said title deeds (particularly the deeds to said Conway Robinson, plaintiffs' testator), *without showing, mentioning, or excepting any lane or road over the same*, either in the *body* of any of the deeds or in *plats* annexed to any of them" (Rec.,

p. 21). Testator's title deeds and title papers, as well as those of all the other owners of the soil, were duly *acknowledged and recorded* under the laws of this District (Rec., p. 20). Upon this evidence and the authorities referred to above, we respectfully submit that the court should have granted plaintiffs' first prayer and erred in refusing it, and that the court's ruling on said prayer was very disadvantageous to appellees and very advantageous to appellant.

IX.

FACTS AND CIRCUMSTANCES TENDING TO PROVE HAREWOOD ROAD WAS NOT A COMMON OR PUBLIC HIGHWAY, AND TENDING TO REBUT ITS BEING A COMMON OR PUBLIC HIGHWAY.

First. Non-recordation as a public road tends to prove its use by the public was not adverse or under a claim of right, but merely *permissive* or *precarious.*

The Maryland act of 1704 (a general statute in force in this District) provides as follows:

"And, *for the better ascertaining what is or shall be deemed public roads*, be it, &c., enacted, &c., That the justices of the county courts *shall set down and ascertain in their records, once every year, what are the public roads of their respective counties.*"

Md. act of 1704, ch. 21, § 3.

The Maryland act of 1795 (a special act under which the road from Georgetown, D. C., to the Little Falls bridge was laid out and made by the Georgetown Bridge Company), appoints the trustees of said company commissioners, and enacts that they locate, open, and lay off said road, "and shall cause a location thereof to be made, *and the same to be recorded among the records of the territory of Columbia;* and the said road *shall be a public highway forever*," &c.

Md. act of 1795, ch. 44, § 2.

In 1801 Congress enacted—

"That the laws of the State of Maryland as they now exist, shall be and continue in force in that part of the said District, which was ceded by that State to the United States," &c.

Act of Congress of Feb'y 27, 1801, ch. 15, § 1; 2 Stat. L., 104, 105.
R. S. D. C., § 92, p. 9.
Compiled Statutes, ch. 39, § 2, p. 337.

At the time this act was passed by Congress the Maryland statutes quoted, *supra*, were in full force as laws of Maryland, and as such were by this statute adopted by Congress as laws of this District.

The Revised Statutes of this District provide as follows:

"SEC. 246. All public roads within said District, outside the limits of Washington and Georgetown, which have been duly laid out or declared and *recorded as such*, are public highways."

"SEC. 248. *Every public highway shall be surveyed and platted, and a certificate of the survey and plat shall be recorded* among the records used for recording surveys and plats of highways."

Revised Statutes of the D. C., §§ 246, 248, pp. 28, 29.
Compiled Statutes, ch. 29, §§ 1, 3, p. 267.

The construction and effect of these statutes has come before our court and been passed upon in several cases. In Schwarz' case he was indicted *for obstructing a public highway*. Several deeds were read in evidence from General Forrest, the original owner, to sundry persons bounded by the road, *calling it a public road*. Defendant's attorney contended, however, that under the Maryland act of 1704, ch. 21, *supra*, there could be *no highway* in Maryland unless it be *of record*. The attorney for the United States "prayed the court to instruct the jury, that if they should be of opinion that it was *laid off and dedicated* by U. Forrest, the original owner of the lands through which the said road passed, *as a public road*,

and has been, ever since, *used as such*, then it would be competent for the jury to consider it a public road and common highway."

"But the court refused to give that instruction; but instructed the jury *that there could be no public road in this county*, out of the cities and towns, unless it be *recorded* as such in this court or the levy court," citing said Maryland act of 1704, c. 21, *supra*.

U. S. *vs.* Schwarz, 4 Cr. C. Ct., 160, 161.

Emery's case arose in 1832. He also was indicted for obstructing a public highway. The road in that case was the one between Georgetown, D. C., and the Little Falls bridge, laid out under the act of 1795, ch. 44, § 2, *supra*. Defendant's attorney cited that act and contended that said road was *not a public highway* because *not recorded as such*. The court cited the Schwarz case, *supra*, and instructed the jury—

"That, as the location of the road *had never been 'recorded among the records of the Territory of Columbia,'* as required by the Maryland act of 1795, c. 44, § 2, *it was not a public highway*, and therefore the indictment could not be sustained."

U. S. *vs.* Emery, 4 Cr., C. Ct., 270.

S. P., Brander *vs.* Chesterfield Justices, 5 Call (Va.), 554.

U. S. *vs.* King, 1 Cr. C. Ct., 444, 445.

In the Rock Creek Park case the effect of *non-recordation of a road as a public road* came squarely before our court in general term. The commissioners who were to assess the values of lands taken for said park were instructed by said court as follows:

"If there shall be claimants of any lands *within the lines of roads or thoroughfares* within the said park the commissioners will take such testimony as either side shall adduce, bearing upon the question whether such road or thoroughfare is a *public* or *private* road or thoroughfare, and they

shall report such testimony to the court, together with their assessment of the values of the land within the lines of any such road or thoroughfare, which assessment shall be in the *alternative*—that is to say, they shall assess the land so occupied by said roads and thoroughfares at their just values as though *not subject to any such easement*, and shall also assess the values of said land so occupied as though *subject to a perpetual easement of said roadways and thoroughfares*."

Before said commissioners Mrs. Carpenter proved that she had sold all of her land on each side of the Military road to the side lines of said road and had nothing left but what was covered by and within the lines of said Military road, but she proved her title deed to said part of the Military road, showing a fee-simple title to the same in herself. Thereupon the Government proved by George N. Beale, the surveyor of highways, that from 1862 or 1863 to the time of his testifying (1891) said Military road *had always been used as a public thoroughfare without any interruption of that use, and had always been claimed as a public road*, and whenever it was out of repair he had *always* reported it and *it was repaired by the public authorities.*

Mrs. Carpenter proved that said Military road was never condemned by the public authorities, never deeded or conveyed to the public, and never paid for. The Government admitted that *it had never been recorded as a public road.* The commissioners, pursuant to the court's instructions, reported the testimony to the court and appraised the value of the land claimed by Mrs. Carpenter, *free of easements and rights of way over the same*, at $985.50, and appraised the value of the land in said road claimed by her, *subject to easements and rights of way, if any such exist over the same*, at $56.70.

Mrs. Carpenter thereupon moved the general term to adjudicate that she was entitled to the sum of $985.50 as the appraised value of the land claimed by her. In support of her motion it was contended that all public roads in this

District, outside of Washington and Georgetown, are required by law to be *surveyed, platted, and recorded as such*, and that the Military road, *never having been recorded as a public road, was not a legal public road*, and consequently she was entitled to the full fee-simple value *free of all easements.*

The general term, Justices Bingham, Hagner, and Cox, decreed as follows:

"This cause coming on to be heard upon the claim of Anna M. Carpenter to a part of the Military road and as to whether she is entitled to be paid the value of the land included within the portion of said road claimed by her *free from* or *subject to* easements and rights of way over the same, and having been fully argued by counsel for her and for said commission respectively and submitted to the court. It is this 1st day of April, 1893, upon consideration thereof by the court hereby adjudged, ordered and decreed that said Anna M. Carpenter is entitled to be paid the full fee-simple value of the land claimed by her, *free and clear of all, and of any easements and rights of way over the same*, and her said land having been so appraised at the value of $985.50, it is hereby further ordered, adjudged and decreed that she is entitled to receive that sum, and the clerk of this court is hereby ordered to pay her, or to Conway Robinson, Jr., her attorney, said sum of $985.50 out of the funds in his hands."

General Term Minutes, vol. 8, pp. 60, 61.

No presumption of a grant of common and public highway or presumption of a rightful creation of such a highway in any lawful manner can be made where circumstances exist which negative the presumption of such acquisition.

"The most common method adopted to *rebut* such a presumption is *the placing of a gate or bar across the road*, to open and shut at pleasure."

Angell on Highways, 3d ed., § 152, p. 177.

The barring of the road tends to show that its use is not adverse or under a claim of right, but *merely by leave, license, or permission* of the owner of the soil. As long as the right to bar it *is recognized as still existing*, prescriptive or adverse use *does not commence to run.*

Now, the decisions referred to above show that the public authorities cannot prevent the obstruction of a road *not recorded as a public road*, no matter how long it has been used and repaired by the public; and if the public authorities are powerless to prevent a road *not surveyed, platted, and recorded as a public road* from being obstructed by strangers who have no title to or interest in the soil thereof, surely they could not prevent the owner of the soil from barring or obstructing it. He unquestionably could bar it or obstruct it against the public at his own sweet will and pleasure with perfect impunity. The effect of our statutes requiring public roads to be surveyed, platted, and recorded as public roads is therefore to notify and advise the owner of the soil that until the public authorities survey, plat, and record a road as a public road he, the owner of the soil, need not go through the idle form of ever actually barring it, because by the decisions of our court, *supra*, his right to bar it against the public at any time he pleases so to do is recognized as existing as long as the road is not surveyed, platted, and recorded as a public road, as required by law. The decisions to which we have referred should be regarded as establishing a settled rule of property in this District. They have induced every owner of the soil over which such a road ran to believe that its use by the public would be regarded not as adverse or under a claim of right, but as merely permissive or precarious till it was surveyed, platted, and recorded as a public road, and so have induced him to believe that till surveyed, platted, and recorded, as required by law, he need not bar it to prevent its use from being considered adverse. After so lulling him into rest to hold otherwise now would be to deprive him of his property by

reason of his having relied upon and acted on the court's unbroken line of decisions construing our said statutes as aforesaid. In the case at bar the bill of exceptions expressly states there was on behalf of appellee evidence "*that said lane or road* (Harewood road) *was never surveyed, platted, or recorded as a public road or highway as required by law*" (Rec., p. 21).

~~The assertion in appellant's brief (p. 25) that there was no such evidence is at once refuted and completely contradicted by a mere glance at this identical evidence (Rec., p. 21).~~

With this evidence in the case and before the court and jury, it is respectfully submitted that under the statutes above mentioned and the decisions construing them, to which we have referred, there was no error in the court's instructing the jury in plaintiffs' twelfth prayer that if from the evidence they believed "that said (Harewood) lane or road was never surveyed, platted, or recorded as a public road or highway, as required by law," it "would *tend to prove* that said lane or road was not a common or public highway, and would *tend to rebut* any presumption of its being a common or public highway" (Rec., p. 43).

The court's instruction on this matter in plaintiffs' twelfth prayer (Rec., p. 43) was certainly correct, ~~and in this respect there is nothing in appellant's ninth assignment of errors.~~

Second. In the case at bar the bill of exceptions contains and expressly sets out evidence on behalf of appellees—

"That said lane or road is now, and for some time past has been, called and known by the name of '*Harewood road*,' and that part of it where it passed over said piece of land called the 'Vineyard' was formerly called and known by the name of '*Agg road*,'" and that another part of it where it passed over what was formerly George W. Riggs' land (part of said 'Pleasant Hills' tract) west of the 'Vineyard,' was formerly called and known by the name of '*Riggs road*' between the present grounds of the Soldiers' Home and the National cemetery, and that still another part of it, which

passed over parts of said 'Pleasant Hills' and 'Turkey Thicket' tracts south of the 'Vineyard' was in early days called and known by the name of '*Duley's lane*,' Henry Duley's land lying to the *east* thereof and James White Sr.'s land lying to the *west* thereof; that travel over said (Harewood) lane or road over said lands of plaintiffs' testator *originated for the accommodation* of some prior owner or owners of that tract and the adjoining tract or of one of said tracts and of those deriving title from or under such owner or owners of one or of both of said tracts; that afterwards they *permitted* some of their neighbors to travel over said lane or road, and still later *permitted* others also to travel over it, and finally people generally were *permitted* to travel over it; that said lane or road commenced on the Bunker Hill or Bladensburg road at the southerly end of the common boundary line between said tract called 'Turkey Thicket' and said tract called 'Pleasant Hills' or 'Pleasant Hills resurveyed' and ran northwardly for about half a mile along said common boundary line, half on James White, Sr.'s tract called 'Pleasant Hills' or 'Pleasant Hills resurveyed' and half on Henry Duley's tract called 'Turkey Thicket' for this distance, and thence leaving and crossing said boundary line, said lane or road ran in a northwestwardly direction over said piece of land called the 'Vineyard' (part of said 'Pleasant Hills' tract) to George W. Riggs' part of said 'Pleasant Hills' tract, and thence continued in a northwestwardly direction over said Riggs' part of 'Pleasant Hills' to Rock Creek Church road; that a much shorter route and much better grade could have been obtained had said lane or road been located so as to run more directly through the body of said 'Pleasant Hills' tract instead of following, as it does, for so long a distance the common boundary line between that tract and the 'Turkey Thicket' tract; that in the partition of said James White Sr.'s 'Pleasant Hills' tract among his devisees *in 1801* the title papers of that tract and the courses, distances, metes, bounds, and plats composing or forming parts of said title papers (in connection with recent surveys) mention and locate '*a stake in Duley's lane*' and show that said stake in 'Duley's lane' stood in the middle of what is now called 'Harewood road' and upon the common boundary line between said 'Pleasant Hills' and 'Turkey Thicket' tracts at the end of 64½ perches from the southern end of said bound-

ary line, *this mention in* 1801 *being the earliest mention of 'Daley's lane,' afterwards called 'Harewood road'* " (Rec., pp. 20, 21, 22).

Notwithstanding appellant's asserting to the contrary, we submit that such evidence showed or tended to show that there was no right of way or easement public or private. It certainly tended to show a use, *never adverse*, but always permissive and precarious from first to last—mere *permissive use* by the original owner or owners; mere *permissive* use afterwards by some of their neighbors; mere *permissive use* still later by others; and finally mere *permissive use* by people generally.

Appellant's attorneys ~~brief, p. 25,~~ say: "there was no evidence on which to base the assumption of the plaintiffs' twelfth prayer that travel over what is now Harewood road originated for the accommodation of some prior owner or owners of the tract and the adjoining tract." The evidence quoted above must have been overlooked by appellant's attorneys; at all events, it completely refutes their said assertion. They further assert ~~in their brief~~ that even if travel over said lane or road did so originate it would not "tend to prove that said lane or road was not a common or public highway nor tend to rebut any presumption of its being a common or public highway" ~~(Appellant's Brief, p. 25).~~ Our contention is just the reverse, namely, that such evidence tends to prove that it was neither a common or public highway nor a private way; that it was not a right of way or easement of any kind, but a mere *precarious* use, and that such evidence tends to rebut any presumption to the contrary of mere precarious user.

In a Pennsylvania case decided in 1891 the supreme court of that State say:

"If the facts assumed in the point * * * had been found by the jury, viz., that the travel over these farms began *in the intimate relations* of the two brothers, who owned and occupied them, and *for their mutual accommoda-*

tion, and was continued, after the title of one of them had passed to others on the *same basis*, and in the *same spirit of mutual accommodation*, then we think it clear that *the user of neither was adverse to the other*, and that *no title was acquired by means of it*."

Bennett *vs.* Biddle, 21 Atlantic Rep., 364.

In a Kentucky case the court of appeals of that State say:

"It cannot be admitted that where the proprietor of land *has a passway through it for his own use*, that the mere *permissive use* of it by *other persons* for half a century, would confer upon them any right to its enjoyment. So long as its use is merely *permissive* it confers no rights; but the proprietor can prohibit its use, or discontinue it altogether, at his pleasure. A different doctrine would have a tendency to destroy all *neighborhood accommodation* in the way of travel; for if it were once understood that a man, by allowing *his neighbor* to pass through his farm without objection over the passway which he used himself, would thereby, after the lapse of 20 or 30 years, confer a right on him to require the passway to be kept open for his benefit and enjoyment, a prohibition against all such travel would immediately ensue. * * * Where the way is opened as a private passway, and that fact clearly appears, *it cannot be converted into a public highway by the mere use thereof, no matter how long that use may be continued*."

Hall *vs.* McLeod, 2 Met. (Ky.), 101, 105.
S. P., Illinois Ins. Co. *vs.* Littlefield, 67 Ill., 373.
Shellhouse *vs.* The State, 110 Ind., 514.

These cases certainly show that the above-quoted evidence on behalf of appellees as to the origin and history of Harewood road (Rec. pp. 20, 22, 21) *tended* to prove a mere *precarious use*, and *tended* to disprove any common or public highway or other right of way or easement.

Having originally so commenced as a *precarious* use, it thereafter continues as mere *precarious* use *until there is clear and unambiguous proof of a subsequent change to and starting of adverse use*.

Where L. tells Mrs. P. that if she will dig out a spring on

L.'s land, stone it up, and lay pipes to convey the water to her house, she may have the spring, the court, in a case where plaintiff derived title from L. and defendants from Mrs. P., *hold* that this creates a *license* merely which may be revoked, even though Mrs. P. complies with L.'s offer; and further *hold* that occupation of the spring on L.'s land begun by Mrs. P. under such *license* will not ripen into an *easement* without *some unequivocal act* of Mrs. P. showing that her occupation is adverse to L.

The court say:

"The defense is placed on two grounds—first, under a gift from Ladd to Peabody; second, under a right by prescription. The facts found by the referee are, that Ladd, soon after the conveyance to him *in 1833*, gave Mrs. Peabody the right to the spring if she would dig it out, stone it, and lay a pipe to convey the water to her house. She did dig out the spring, stone it, and lay the pipe, and the water continued to run *until 1874*, when this controversy arose.

"The gift of Ladd to Peabody was a *license* merely, and did not and could not convey an *easement* in the land or in the spring. Title by prescription can only be acquired by an *adverse, exclusive, uninterrupted use, sufficiently long continued (in this State for 20 years) under a claim of title and with the knowledge and acquiescence of the owner of the land.* It must be under a claim of legal right, and not by *consent, permission, or indulgence*, and THESE FACTS MUST BE PROVED BY THE PARTY CLAIMING THE EASEMENT. * * * It is true that an uninterrupted use for 20 years, *unexplained*, is evidence from which the jury may find a prescriptive right, *but the facts under which the user in this case commenced are a sufficient explanation.* The user having been *commenced* under Ladd's license, if the defendants and their grantors would have had their user adverse, *they should have done some unequivocal act showing such intention.* * * * There is another conclusive answer to the defendants' case. The question whether the defendants, and those under whom they claim, had acquired an easement in the plaintiff's land by long user, was a question of mixed law and fact, and was to be determined *by the referee* upon evidence. His finding *for the plaintiff* is a finding that the user by the

defendants and their grantor was not of a character to create an easement in the plaintiff's land in their favor."

Taylor *vs.* Gerrish, 59 N. H., 570, 571.

We submit that the origin of said lane or road certainly *tended to prove* what the court in plaintiffs' twelfth prayer told the jury it *tended to prove*, viz., that said lane or road was *not* a common or public highway, and certainly *tended to rebut* what the court in plaintiffs' twelfth prayer told the jury it *tended to rebut*, viz., any presumption of its being a common or public highway. In these respects plaintiffs' twelfth prayer was entirely correct and altogether proper, ~~and in this respect there is nothing in appellants' ninth assignment of errors.~~

Third. In the case at bar the bill of exceptions contains and expressly sets out evidence on behalf of appellees as follows:

"That said lane or road *down to the commencement* of the civil war was but little used, and very few people went along it or traveled it *before* the war; that said lane or road was *not repaired or recognized by the public authorities until after the late civil war;* that *after* the late civil war, *but not before that time*, ordinary superficial repairs to said road were made by the public authorities, and *after 1865* no objection was ever made by plaintiffs' testator to the acts of the public authorities in keeping the road in what might be called ordinary *superficial* repair, *when such repairs were in accord with the idea of plaintiffs' testator as to what should be done*, BUT SUCH REPAIRS OR IMPROVEMENTS WERE PREVENTED BY HIM WHEN NOT IN ACCORDANCE WITH HIS DESIRES OR VIEWS AS TO THE NEEDS OF THE ROAD; that about 1878, prior to the trespasses complained of, plaintiffs' testator *stopped the work* of men employed by George N. Beale, supervisor of county roads, who had been sent there to make some ridges across the road so that water accumulating would drain across to the north side of the road; that *said work not being in accordance with the wishes of plaintiffs' testator, he objected to it, and thereupon said ridges were removed by said supervisor of highways*" (Rec., pp. 22, 23, 24, 25, ~~26~~).

Here, then, was evidence before the jury that the public authorities *never repaired* said lane or way at all until *after the close* of the late civil war—*after 1865*; and here, too, was evidence that nothing but mere superficial repairs to said lane or way were ever made by the public authorities *after the close* of said war—*after 1865*—and that even such repairs were under the domination and control of plaintiffs' testator, and, when so made by them, were made in complete subordination to and recognition of the *paramount* rights and title of the plaintiffs' testator, who *prevented* them from making the same when *objectionable* to him, *stopped* them from doing so when he *pleased*, and made them *undo* and *remove* what they had done if he *objected* to the same.

Such testimony *tends to prove* that said lane or road was not a common or public highway, and *tends to rebut* any presumption of its being a common or public highway, just as the court instructed the jury in plaintiffs' twelfth prayer, and so the authorities hold.

In a Missouri case it was held that repairs to an alley by the owner of the soil and his keeping it in repair was a circumstance inconsistent with the hypothesis of its being a *public* alley (*Brink vs. Collier*, 56 Mo., 163).

In a case where the question was whether a road was or was not a *public* road and where the "parish" had charge of all public roads, the court instructed the jury:

"The fact of *no repairs* having been ever known to be done to the road by the parish, *is a circumstance* from which you may *infer* that it is *not a public road*."

Davies *vs.* Stephens, 7 Carr & Payne, *571; 32 E. C. L., 764.

S. P., Angell on Highways, 3d ed., § 152, p. 178.

Where the question was whether a road was a public road or not, either by dedication *or prescription*, the Supreme Court of the United States mention different facts and, among others, that the owners of the soil "made repairs

on it when needed, as if open for their own use and advantage, *instead of its being repaired by the city, as was done with public highways*," and then say:

"Circumstances like these seem *entirely inconsistent with* the idea that any intended dedication had been made of these premises, or the use of them, to the public. *The effect of these circumstances is to undermine and destroy also the other ground set up by the bill*, as well as the decree below, *that a public highway had been established there*, not by dedication, but *by over* 30 *years' use of the land for that purpose by the community.*"

Irwin *vs.* Dixion, 9 Howard (U. S.), 33.

We submit, therefore, that in this respect plaintiffs' twelfth prayer was correct and proper, and that in this respect there is nothing in appellant's ninth assignment of errors.

Fourth. In the case at bar the bill of exceptions contains and expressly sets out evidence on behalf of appellees as follows:

"That there was *a fence on the south side*, but *none on the north side* of said lane or road where it crossed said tract called the 'Vineyard,' and that there were fences on the east and west boundaries of said tract called the 'Vineyard,' and that there were such fences in Mr. John Agg's time, before and after he changed the location of part of said lane or road within the limits of his said place called the 'Vineyard;' THAT FROM 1842 TO THE TIME OF THE CONVEYANCE OF MAY 15, 1857, TO PLAINTIFFS' TESTATOR, CONWAY ROBINSON (in addition to a gate leading to Mr. Agg's house in said *south fence* and near Mr. Agg's house) *a gate* was maintained *across* said 'Duley's lane,' 'Agg's road,' or 'Harewood road,' *barring the same*, by the owner or owners of said tract called the 'Vineyard,' or their tenants, *where it crossed* and left the *eastern boundary line* of said tract called the 'Vineyard,' and that on the *western boundary* of said tract called the 'Vineyard' *two gate-posts stood*, not in said south fence, but *on opposite sides of said lane or road*, so that the said road could *not* be traveled through said tract called the 'Vineyard' without pass-

ing *through* such *western gate-posts*, and without *opening* such *eastern gate* and going *through the same*, and that the *gate-posts* (one on *one* side of said road and the other on the *opposite* side of said road) *of said eastern gate* continued to stand for some time after this *eastern gate itself* wore out or disappeared, and stood there UNTIL SOME TIME IN 1861, AFTER THE LATE CIVIL WAR HAD COMMENCED" (Rec., p. 22).

It is a most significant fact that there is in this case no evidence of any protest or objection whatsoever at any time, either by the public authorities or by any one whomsoever, against the maintenance of these gates across this road during all these many years. Whether they had been there from its commencement, or how long they had been there prior to 1842, does not appear; but there they stood in 1842, gate-posts and gate barring this road, and there they continued to stand from 1842 to 1857—fifteen long years—and there they still were, *gate-posts* and *gate*, when said tract was purchased and acquired by and conveyed to said testator on May 15, 1857 (Rec., p. 22). How long the *gate* itself across said road at the *eastern* boundary line of said tract continued to stand after May 15, 1857, or how long it was thereafter before it wore out or disappeared, the evidence does not show; but as a matter of history we know that at the very beginning of our late civil war forts were built all around Washington, and troops were camped all over that neighborhood, and if fences and *gates* disappeared about that time it is not at all surprising, nor is it surprising that the *gate-posts*, from their size and weight and the difficulty of removing them, should be the last to disappear or to find their way to the camp fire of the soldier. The very significant fact was proved that the "*gate-posts*" of said eastern gate "*stood there until some time in* 1861, *after the late civil war had commenced*" (Rec., p. 22). It is also a historic fact that troops were constantly camped over that neighborhood all during that war and until some time after the surrender, and there is certainly nothing sur-

prising in the fact that during war times and whilst the soldiers were around there the gates were not replaced, when to do so would merely have resulted in supplying the soldiers with that much extra fuel.

Could there be any more convincing proof that said lane or road was not a common or public highway or any evidence more emphatically rebutting any presumption of its being a common or public highway than this testimony concerning these *gates* and *gate-posts* which we have quoted above?

In an Indiana case the court, conceding that the alley in question had been used by the public for more than 20 years, said:

"This, however, is not sufficient to establish a public way by prescription. Before a highway can be thus established it must appear that the general public, *under a claim of right* and *not by mere permission* of the owner, used some defined way, *without interruption or substantial change, for a period of twenty years or more.*

"WHEN THE USE IS INTERRUPTED PRESCRIPTION IS ANNIHILATED AND MUST BEGIN AGAIN.

"A highway, from its very nature, must be open to the public for use day and night, and *any unambiguous act of the owner, such as erecting gates or bars over the highway, which evinces his intention to exclude the public from the uninterrupted use of the highway destroys the prescriptive right*, unless it had fully matured before it was interrupted. * * * It very clearly appears that from 1871 to 1875 *gates* were maintained across what is now claimed as part of the public alley. * * * The public was thus excluded. When it used the passageway it was by permission of the owner."

Shellhouse *vs.* The State, 110 Ind., 511, 512.

In an Iowa case the court say:

"It seems to us that the existence of such *gates* and *bars* alone sufficiently shows that the public use was *not under a claim of right.*"

The State *vs.* Green, 41 Iowa, 696.

In a Wisconsin case the question was whether or not a certain road was a highway or not. *Gates and bars* were placed across it for the purpose of herding stock or cattle at night. The court below instructed the jury that "if such *gates and bars* were exclusively for the accommodation of the public it was for the jury to determine whether they furnished evidence of an admission or denial by the defendant of the right of the public." The court above held that the error in this portion of the charge was in submitting to the jury the question whether the erection of such bars and the maintaining them for a number of years afforded any evidence of an admission on the part of the owner of the soil of any right to use the way for a public road, the court above saying:

"*These acts, as it appears to us, conclusively negative any inference that the owners intended that the lane should be a highway.* For surely *nothing is more inconsistent* with the purpose and object of a public highway than the right of any individual to fence it up *or put bars across it.* A highway, from its very nature, must be open and free for the passage of all persons, both by day and night, who may have occasion to travel it. No one has a right to enclose it with *gates and bars* for the purpose of herding cattle at night; and where the owner of the soil does thus fence up a way, *he evinces in the most unambiguous manner an intention to exclude the public from it.* * * * These acts indicate *an intention* on the part of the owners of the soil *to exclude the public travel*, and *to retain absolute control over the way.* It is impossible for the public to use a highway thus fenced up and obstructed *by gates.* It is idle to say they may accommodate the public, or exist for any time *without destroying the character of the road as a highway.* And as there was no conflict whatever in the evidence that the disputed road or lane had thus been obstructed for years—and before it could have become a highway by user—the court should have told the jury that this fact indicated *an unmistakable purpose on the part of the owners to prevent the use of such road as a highway.* For it did amount to an *absolute denial, by acts*, of the right of the public to travel over the road and to use it as all highways are and must necessarily be used."

Jones *vs.* Davis, 35 Wis., 382, 383.

In a Massachusetts case the court say:

"*Gates* were established and kept up by the proprietors of the land, which is a sufficient indication, that although they were willing people should pass over their pasture, they did not mean to give the land over which the way passed, or surrender their right of discontinuing the use."

Commonwealth *vs.* Newbury, 2 Pick. (Mass.), 57.

Mr. Washburn says:

"If in opening a passageway of a character which might otherwise be deemed a public way the owner of the land should place *a gate at its entrance*, by which such passage may be closed, it would be regarded *as evidence negativing the intention to make it a public way.* NOR WOULD IT BECOME SO BY THE GATE BEING SUFFERED TO GO TO DECAY OR CEASING TO BE USED. * * * So that even when, at the first opening of such way, *a post only had been put up*, which soon after was *knocked down*, and *remained down for* 12 *years*, and the passage had been *uninterrupted all that time*, it was determined that the owner might maintain trespass against those who used the way. The doctrine that the erection of a *post* or a *gate* at the entrance of a passageway or *similar acts*, may negative the intention of the owner to dedicate it, and thereby prevent it becoming a highway, is undoubtedly well sustained both in England and this country."

Washburn on Easement, *133; 4th ed., pp. 209, 210.
Lethridge *vs.* Winter, 1 Campbell, 263, note.
S. P., Harris *vs.* The Commonwealth, 20 Va., 838.

In a New York case it was contended that the *locus in quo* was a public highway, but the supreme court of that State say:

"Plaintiff's dominion and control of the road had been indicated *in the most unequivocal manner* by the erection of *gates* across the road."

Carpenter *vs.* Gwynn, 35 Barbour (N. Y.), 406.

Proof that a way had been used as a road for more than thirty years, encumbered with *gates and bars* in the summer seasons; that it had never been fenced on its sides, but that

within the last six years it had been included within the limits of a highway surveyor of the town and *repairs made thereon* under his direction, *held* not sufficient to show that it is a public highway.

State *vs.* Strong, 25 Maine, 297.

Mr. Elliott says:

"The owner of the soil may effectively defeat a presumption arising from use by the public by placing *gates* or *bars* across the way."

Elliott on Roads and Streets, p. 130.

The mere erection of a *bar*, although soon knocked down, *rebuts prescription or dedication to the public.* Where to an action of trespass *quare clausam fregit*, the defendant justified under a public right of way. It appeared in evidence that some years before a street was made over the *locus in quo*, and *a bar placed across the street, but that the bar was soon knocked down; since which time it had been used as a thoroughfare.* The court, Heath, J., held:

"*The putting up of the bar rebutted the presumption of a dedication to the public.*"

Roberts *vs.* Karr, 1 Campbell, 262, note *b*.

So, too, in an action of trespass for entering plaintiff's close and pulling down a *gate.* Plea, that there was a public footway over the *locus in quo*, and because the gate was wrongfully erected across the same the defendant pulled it down. It appeared in evidence that the *gate* in question had been recently put up in a place where a similar *gate* had formerly stood, *but where for the last* 12 *years there had been none.* It is thereupon contended for the defendant that from suffering the gate to be down so long, and permitting the public to use the way without obstruction for so many years, the plaintiff and those under whom he claimed must be considered as having completely dedicated the way to the

public, and that the gate could not be replaced. The plaintiff, however, under the direction of MARSHALL, serjeant, had a verdict, which the court of King's Bench the following term refused a rule *nisi* to set aside."

Lethridge *vs.* Winter, 1 Campbell, 263, note.

It is respectfully submitted that proof of such gates and gate-posts unquestionably tended to prove that said lane or road was not a common or public highway, and unquestionably tended to rebut any presumption of its being a common or public highway, just as the court instructed the jury in plaintiffs' twelfth prayer. ~~There is nothing in this respect in appellant's ninth assignment of errors.~~

Fifth. In the case at bar the bill of exceptions contains and expressly sets out evidence on behalf of appellees as follows:

"That *the location* of part of said lane or road passing over said piece of land called the "Vineyard" *was changed by Mr. John Agg while he was in possession thereof under said lease, for the reason that he wished it further from his house, and that said John Agg employed and paid the hands who made this change*" (Rec., p. 21).

Mr. John Agg purchased said leasehold on November 8, 1836, and died possessed of said property between April 18, 1855, when his will is dated, and May 3, 1855, when it was probated (Rec., p. 19).

The mere fact that an owner of the soil of a lane or road repairs it at his own expense is a circumstance strongly tending to *rebut* its being a *public* road (*Elliott on Roads*, p 131; Angell on Highways, 3d ed., § 153, p. 179; Irwin *vs.* Dixion, 9 Howard, 33; Brinck *vs.* Collier, 56 Mo, 163; Carpenter *vs.* Gwynn, 35 Barb. (N. Y.), 405 to 407).

In the last of these cases the court say:

"After the plaintiff acquired the title to the whole of the land, *he laid it out as a road, graded and worked it at an ex-*

pense of upwards of $5,000, and fenced it on both sides. When the road was first opened, *gates* were placed at each end. This was in 1854, and these gates or one of them remained * * * while the plaintiff was grading the intermediate portion of the road, until it became necessary to grade that part of it where the gates stood, that is the extremities. * * * This was in the autumn of 1856 and the spring of 1857. * * * *The subsequent working was at the plaintiff's individual expense*, and his *dominion* and *control* of the road had been indicated *in the most unequivocal manner*, by the erection of gates across the road. * * * *No one had a right to infer from the removal of gates* under such circumstances, *that it was the plaintiff's purpose never to replace them. No such presumption attaches to such acts.*"

Carpenter *vs.* Gwynn, 35 Barb. (N. Y.), 405 to 407.

In Newbury's case the question was whether or not a road was or was not a public road. After saying that "there had been 50 or 60 years user, probably much longer," the court mention, among other facts tending to rebut or disprove highway, that witnesses testify that "*less than* 30 *years ago the entrance has been changed by the proprietors of the land adjoining.*"

Comm. *vs.* Newbury, 2 Pick., 56.

So, too, in a Kentucky case, where a passway running in the same general direction had existed for at least 50 years, the court mention, as a circumstance tending to rebut or disprove highway, that: "Its position has been changed, from time to time, according to the pleasure and discretion of the proprietors of the land through which it passed."

Bowman *vs.* Wickliffe, 15 B. Monroe (Ky.), *96.

In the case at bar Mr. John Agg, whilst he occupied the "Vineyard," performed a much more convincing act of dominion and control than the mere making and working of a road at the owner's individual expense, for he *changed the location* of part of it, *employing and paying* the men at his *own* individual expense to *make and work* it in such new

location; and this, too, was done for his own reasons, merely because he wished said road further from his house. Had said road been a *public* road, he could have been indicted for so doing. And besides, as has been pointed out above in this brief, his boundary fences and his fence on the south side of said road were maintained, and *gate-posts* and *gates* were maintained across said lane or road, *before* and *after* he made this change of location. Such gates continued standing and barring said road from 1842 to at least May 15, 1857, and such gate-posts till some time in 1861, long after said Agg's death (Rec., p. 22).

Surely this testimony *tended* to prove that said lane or road was not a common or public highway, and *tended* to rebut any presumption of its being a common or public highway, as the court instructed the jury in plaintiffs' twelfth prayer. ~~We submit that in this respect there is nothing in appellant's ninth assignment of errors.~~

Sixth. In the case at bar the bill of exceptions contains and expressly sets out evidence on behalf of appellees as follows:

"That *taxes were assessed* by the public authorities upon *and paid* by the owners of said tract called the 'Vineyard' or their tenants upon said tract of land as a whole, including land within the limits of said lane or road. * * * That plaintiffs' testator and those under whom he claimed had *paid taxes* upon this land and had been *assessed* as well for the land *included within the lines of 'Harewood' road* as for the rest of the property" (Rec., pp. 22, 25).

It is laid down by Mr. Elliott in his work on this subject that "payment of *taxes* assessed by the local authorities is evidence *tending* to defeat the presumption" of its being a public road or highway.

Elliott on Roads, p. 131.

It may be said in the case at bar as it was said in a circuit court case:

"In *Irwin vs. Dixion, supra*, the property had been taxed as in this case, and the owner had paid the taxes as in this case, and that fact is mentioned by the court as a circumstance *repelling* the idea of a dedication or prescription. The court further says, 'In order to have a use or occupation accomplish this (prescription), it must have been *adverse* to the owner. It must have also been an *exclusive* use by the public. It must also have been acquiesced in by the owner, and *not contested or denied*.'"

Nelson *vs.* City of Madison, 3 Biss. C. Ct., 255.
Irwin *vs.* Dixion, 9 Howard, 32.

We respectfully submit that plaintiffs' twelfth prayer was altogether correct and proper as to evidence of such assessment and payment of taxes, *tending to prove* that said lane or road was not a common or public highway, and *tending to rebut* any presumption of its being a common or public highway, ~~and that in this respect there is nothing in appellant's ninth assignment of errors~~.

Seventh. During the possession of plaintiffs' testator, between May 15, 1857 (the date of his first deed), and January 31, 1884 (the date of his death), various things specifically mentioned in the record showed said lane or way not to be a public road or highway and rebutted any such presumption. We have mentioned most of them in one connection or another in other parts of this brief, and in considering plaintiffs' twelfth prayer, which we are now doing, it is unnecessary to here enumerate all of them, but we refer you to the following, viz:

Testator built a *stone wall* several hundred feet long *within the limits of said lane or road* (Rec., p. 22). Testator *after* 1865 *prevented repairs, even mere ordinary superficial repairs*, from being made to said lane or road by the public authorities *when not in accord with his wishes* (Rec., p. 25). Said lane or road was not repaired by the public authorities *before*

that time (Rec., pp. 23, 25, ~~26~~). Testator *in* 1878 *objected* to the supervisor of highways and his employés *making ridges across said road to drain water off of it* and *stopped* them from doing so, and *thereupon said ridges were removed by said supervisor of highways* (Rec., pp. 23, ~~24~~). Such removal of these ridges and such submission to testator's authority constituted a *recognition and acknowledgment* of testator's paramount title and rights.

These acts of testator are all clear and unambiguous acts of *interruption*—acts of *dominion, ownership,* and *control;* but the bill of exceptions also states that "*other acts of ownership over the land within the limits of said lane or road were exercised by the plaintiffs' testator from May* 15, 1857, *to his death, on January* 31, 1884, during which period the testator resided with his family upon said tract called the Vineyard" (Rec., p. 22).

"An easement will *not* arise by prescription where the facts show that the owner of the servient estate *has habitually broken and interrupted the use* whenever he thought proper to do so."

Kerschner *vs.* The W. & A. R. R. Co., 67 Ga., 760.

In a New York case the court say:

"The essential ingredients were to be made out by the owners of the estate claiming the service. They must not only prove the using for 20 years, but that it was *continued, uninterrupted and adverse*—that is, *under a claim of right,* with the acquiescence and knowledge of the owner. * * * Lapse of time is not alone sufficient to afford such a presumption. The use must be adverse to the claim of the owner of the land. * * * Is it possible that any one in the profession would omit the important ingredient that the possession *was adverse* for 20 years. *It is well known that a single lisp of acknowledgment by the defendant that he claims no title, fastens a character upon his possession which makes it unavailable for ages.*"

Colvin *vs.* Burnett, 17 Wend. (N. Y.), 568, 569.

Where such prescriptive right has not already fully matured the court say:

"*Any unambiguous act by the owner,* * * * *which evinces his intention to exclude the public from the uninterrupted use of the highway, destroys the prescriptive right.*"

* * * "*When the use is interrupted, prescription is annihilated, and must begin again.*"

Shellhouse *vs.* The State, 110 Ind., 512.

In a South Carolina case the court say:

"The use must be *adverse,* and *such as would show that no one could dispute the exercise of it.*"

Golding *vs.* Williams, Dudley (So. Car.), 94.

In the case at bar the exercise of the right was not only disputed, but was prevented by the owner of the soil when he saw fit to do so.

In a New Hampshire case the court say:

"The fact that the defendant had claimed and exercised the right to enter upon said land, &c., under this agreement, was a claim not adverse, *but in subordination to the plaintiffs' title.*"

Dodge *vs.* McClintock, 47 New Hampshire, 387.

The testimony referred to above in the case at bar certainly showed that the public authorities had acted in subordination to the title of plaintiffs' testator and those under whom he claimed till the commission of the trespasses complained of.

It is submitted that such acts of dominion, ownership, and control over the land within the limits of said lane or road by plaintiffs' testator, and such submission of the public authorities to the same certainly tended to prove that it was not a common or public highway, and certainly tended to rebut any such presumption. Plaintiffs' twelfth prayer (Rec., p. 43) was correct and proper as to this matter, ~~and there is nothing in this respect in appellant's ninth assignment of errors~~.

Eighth. In the case at bar the bill of exceptions contains and expressly sets out evidence on behalf of appellees as follows:

"That the various owners of said tract of land called the 'Vineyard' by mesne conveyances conveyed the same from one to the other *with covenants of warranty*, and *with plats annexed to some of said title deeds*, and particularly to said assignment of May 15, 1857, of said lease of the 'Vineyard' from E. J. Middleton, executor and devisee of John Agg, to said Conway Robinson, the plaintiffs' testator, and to said deed of May 7, 1870, of the 'Vineyard' from Moncure Robinson and wife to said Conway Robinson, the plaintiffs' testator, *without showing, mentioning or excepting any lane or road over the same*, either in the *body of any of the deeds* or in *plats annexed to any of them*" (Rec., p. 21).

In Washburn on Easements the author says:

"Where there is a grant of land by metes and bounds *without express reservation, and with full covenants of warranty against incumbrances*, there is no just cause for holding that there can be any reservation by implication, unless the easement is strictly one of necessity."

Washburn on Easements, 4th ed., 76.

In a Massachusetts case, where defendant offered evidence that for more than seventy years there had been a road across the *locus*, and that the public had acquired a right to it by prescription, and also that defendant and his predecessors as owners of his close had for more than twenty years used it in passing to and from defendant's close, but where plaintiff offered his deed in evidence, which contained covenants of warranty without excepting any way, and contended that it was evidence in his favor, the court held:

"When the defendant, in an action of trespass *quare clausum fregit*, justifies under an alleged right of way across the plaintiff's close, acquired by more than 20 years' use, the fact that the plaintiff's grantor conveyed the close to him, after the way was used, *without excepting any way and with*

covenants of warranty, has some tendency to show that the defendant's use of the way was *permissive*, and *not adverse*."
Hewins *vs.* Smith, 11 Metc. (Mass.), 241, 244.

So far as this question is concerned, therefore, plaintiffs' twelfth prayer was correct and proper, ~~and there is nothing in this respect in appellants' ninth assignment of errors.~~

Ninth. Said twelfth prayer, after mentioning or referring to various facts as aforesaid, instructed the jury that "these facts or any of them which the jury may believe would *tend to prove* that said lane or road was *not a common or public highway* and would *tend to rebut* any presumption of its being *a common or public highway*, and any and all such facts, if believed by the jury, are to be considered in connection with the other evidence in the case, and if the jury upon the whole evidence believe that said lane or road was not *such* a highway at the time of the acts complained of which have been given in evideuce, *and was not a highway by dedication*, then they should find the issue joined upon the defendant's third additional plea of highway in favor of the plaintiffs" (Rec., pp. 43, 42).

The words "*and was not a highway by dedication*," which are italicized on page 43 of the record, were inserted by the court (Rec., p. 39, note; Rec, p. 43). They were really unnecessary, and may be treated as surplusage. The word "*such*" in the line preceding these italicized words refers back or relates back to the phrase in said twelfth prayer, "*a common or public highway*," ~~at the foot of page 43~~ a few lines above of the record. It is just the same as if the prayer read on page 43 of the record as follows:

"And if the jury upon the whole evidence believe that said lane or road *was not a common or public highway* at the time of the acts complained of which have been given in evidence, *and was not a highway by dedication*, then they should find the issue joined upon the defendant's third additional plea of highway in favor of the plaintiffs."

If the jury upon the whole evidence believed Harewood road was not at that time *a common or public highway* they necessarily believed it was not at that time either a statutory highway or a highway by grant, by prescription, by condemnation, or by dedication. To find that it was not then a *common or public highway* was to find that it was not then a highway of any kind. The court apparently out of abundant caution and to make assurance doubly sure inserted the italicized words "*and was not a highway by dedication.*" This insertion certainly could not have operated to the prejudice or injury of appellant in any way. We have now reviewed all the points arising upon plaintiffs' twelfth prayer and find it correct. We submit that it was rightly and properly granted, ~~and that there is nothing in appellant's ninth assignment of errors.~~

X.

A RIGHT TO GRADE IS NOT AN INCIDENT OF MERE HIGHWAY; IT IS NOT A COMMON-LAW INCIDENT OF HIGHWAY; IT ONLY EXISTS WHEN CONTAINED IN, BESTOWED BY, AND FLOWING FROM STATUTORY LAW IN FORCE WHEN THE RIGHT OF HIGHWAY WAS ORIGINALLY ACQUIRED. GRAVEL, MINERALS, MINES, &C., BENEATH THE SURFACE OF THE HIGHWAY BELONG TO THE OWNER OF THE FEE.

It is well-settled and familiar law that (in the absence of clear words to the contrary) the *fee* in the soil over which a public road or highway passes and *all rights of property* and profits therefrom above or under ground not incompatible with the public right of passage remain perfect in the original owner, subject merely to such public right of passage. If the road is vacated by the public he resumes the exclusive possession. While it is used as a highway he may exercise all rights of ownership not inconsistent with such ease-

ment The timber and grass upon its surface and the *earth, gravel, mines, and minerals* below its surface or imbedded in such public road or highway *are his*, and he may bring and maintain ejectment and *trespass* against any one who does an injury to it not incident to an exercise of such right of passage.

Barclay *vs.* Howell, 6 Peters, 513.
Harris *vs.* Elliott, 10 Peters, 55.
Bosley *vs.* The Susquehanna Canal, 3 Bl. (Md.), 67.
Stackpole *vs.* Healy, 16 Mass., 34.
Comm. *vs.* Peters, 2 Mass., 127.
Robbins *vs.* Borman, 1 Pick. (Mass.), 123.
Bolling *vs.* Mayor, &c., of Petersburg, 3 Rand. (Va.), 572, 573.
Makepeace *vs.* Warden, 1 N. H., 16.
The City of Dubuque *vs.* Maloney, 9 Iowa, 456, 461.
West Covington *vs.* Freking, 8 Bush. (Ky.), 126.
Taylor *vs.* Armstrong, 24 Ark., 102, 106.
Gidney *vs.* Earl, 12 Wend. (N. Y.), 98.
Perly *vs.* Chandler, 6 Mass., 456.
Adams *vs.* Emerson, 6 Pick. (Mass.), 58.
Cortelyou *vs.* Van Brundt, 2 Johns. (N. Y.), 363.

PLAINTIFFS' SIXTH PRAYER, which was refused by the court, merely asserts this proposition of law as to such gravel, mines and minerals, and should have been granted.

One who digs a trench in a road, street, or highway to lay gas pipes or water mains therein cannot justify such acts under a right of way or right of highway.

Regina *vs.* The Sheffield Gas Consumers' Co. *et al.*, 1 Common Law R., 916.
Ellis *vs.* The Sheffield Gas Consumers' Co., 18 Jurist, 146, 147.
Regina *vs.* Langton Gas Co. *et al.*, 6 Jurist (N. S.), 601; 2 Law Times (N. S.), 14, 15.
Galbreath *vs.* Armour, 4 Bell's Cases on Appeal, 377, 402.

A person sold a piece of land, reserving to himself and his heirs a convenient *way-leave*, such as he and his heirs should think proper, for the carriage of coals through the said land from certain coal works of his to the River Tyne. About 20 years before suit an invention had been found out, which was pretty general at the time this land was sold, of making *wagonways* for the more easy carriage of coals, which was done *by leveling ground from one place to another and then laying planks into it for making a more easy and short conveyance of it.* The defendant, Lady Claverinth, as lessee of the coal works under the heirs of said grantor by virtue of the power in said reservation, made a *wagonway* for her coals, and plaintiff preferred his bill against her.

The chancellor referred the case to the barons of the exchequer to have their opinion whether a *wagonway* was within the reservation of a *way-leave.*

The barons gave their opinions:

"*That a wagonway was not reserved.*"

Pit *vs.* Lady Claverinth, 1 Barnardeston's R., 318, 319.

In an early case, where one who was entitled to a right of way over the *locus in quo* filled up some cart ruts and *dug a trench to let out the water*, for which the plaintiff sued him in trespass, the court, Clenche, J., held:

"That he could not dig the soil."

Dike *vs.* Dunston, Godbolt's R., 52.

In another case, where an act of Parliament authorized and empowered certain commissioners "to pave, repair, sink, or *alter* a certain street as they should think fit," the defendants, pursuant to the orders of the said commissioners, *raised* the footway of the street contiguous to the plaintiffs' houses 6 *feet*, and by so raising the footway in manner aforesaid obstructed the doors and windows in the ground floors of plaintiffs' houses and occasioned the injury complained of. The plaintiffs did not own the soil or freehold

of the street, but brought an action on the case as owner of the adjoining land and the buildings thereon.

The court, Gould, J., held:

"I am very clearly of opinion that this action lies against the defendants. Every man of common sense must understand that this act of Parliament ought to be carried into execution without doing such enormous injury to individuals as hath been manifestly done to the plaintiffs in this case. Wherever a trust is put in commissioners by act of Parliament, * * * if they aggrieve and damnify the subject as they have done in the present case, they are answerable in this court civiliter in damages to the party injured."

Blackburn, J.:

"I am of the same opinion. I think the commissioners have acted arbitrarily and tyrannically."

Leader *vs.* Moxon, 3 Wilson, 461, 467 (2 Wm. Blackstone, 925).

So where surveyors of highways dug up and removed so much of the soil of a public street *adjoining and near to* plaintiff's wall (which wall abutted on said street) and thereby not only exposed and laid open the foundation of said wall to the rain and flowing of waters thereto and to the frost and inclemency of the weather, but greatly weakened said wall, by reason whereof 100 feet afterwards fell down and the remainder was greatly injured, the plaintiff (not owning the soil of the street itself, but merely the abutting land and said wall thereon) sued the defendants, as surveyors of highways, in trespass on the case—the acts complained of having been done by their order—and recovered a verdict, which was sustained by the court.

Roberts *vs.* Read, 16 East, 215.

From the early year books down to the present time there is not a solitary case in all the decisions of the English courts in which it has been held that the right to *grade* was *an incident* of a right of way *public* or *private;* not a single

case in which the right to *grade* a public road or highway by the proper authorities has ever been sustained without the express authority of an act of Parliament authorizing such grading.

In every case in which the question of the right or power has come before the English courts they have clearly and emphatically denied and repudiated the existence of any such right or power unless the same was expressly conferred by act of Parliament.

In Fothergell's case a bill was filed by a purchaser for specific performance of a contract for the sale to him of two fields on the cliff at Tenby, with compensation for damage to the property occasioned by the manner in which a road (the right to which was reserved by the contract) had been made by the vendor. The terms of the purchase of the two fields from the defendant were contained in a letter, signed by the defendant, stating that the offer was subject to his reserving the right of making a road through the property in continuation of the present road in front of certain houses and of like width, &c. The intended road was *pegged out* across the fields. Plaintiff accepted the offer contained in said letter.

The road as subsequently made was *cut through the fields*, which were very irregular in surface, and in one part, where there was a knoll, *was 13 feet deep*. The plaintiff was absent from Tenby while the road was being made and did not see it until it was completed, when he protested against it *as being a deep trench*, severing the purchased property into unequal portions and rendering it unfit for building purposes. He accordingly filed his bill for specific performance, and *claimed compensation* for the injury to the property from the road in question.

The evidence was conflicting, but the case made on behalf of the defendant was that, having regard to the irregular and broken nature of the surface, the only way of making a road practicable for horses and vehicles was *by cutting*

through the surface, and that the land had not been at all injured for building purposes.

The vice-chancellor said:

"The agreement was perfectly plain and explicit. Liberty was reserved to the defendant to make *a road* on the land sold to the plaintiff, but what the defendant had done was to make *a cutting and carry away part of the soil.* The road was staked out, and the right of the defendant was to make a road *going over the surface* through the field, and *not through the soil by a cutting;* and judging by the model, there could have been no practical difficulty in making a road *over*, instead of *through*, the knoll which existed in the field. Not only had the *soil* of the field been *abstracted*, but the property had been injured by being rendered no longer available for building purposes. *It was an unwarrantable act on the part of the defendant*, and there had been no acquiescence by the plaintiff so as to bar his right to compensation for the injury. Decree for specific performance with inquiry as to damages."

Fothergill *vs.* Richards, 10 Weekly Notes of Cases [June 5, 1875], English, 108.

In another case which was decided in 1851 the owner of the soil of *a city street* in the city of Oldham brought an action of trespass *q. c. f.* against the defendants for acts done in said street by defendants, as the Oldham police commissioners, who had charge of the streets of Oldham. The defendants pleaded that the *locus in quo* was part of *a public street* called Graves street within Oldham; that the commissioners at a meeting resolved that it was necessary and proper to cause the street to be paved, &c., *and the ground thereof to be lowered and altered*, and that they did accordingly cause the street to be paved, &c., *and the ground thereof to be lowered and altered*, and in so doing committed the alleged trespasses, doing no unnecessary damage. Replication *de injuriâ*; issue thereon. New assignment of other trespasses and to a greater extent than justified in defendants' said plea. Plea to new assignment: Not guilty. Issue

thereon. On the trial the defendants relied upon the Oldham Police Act, 7 G., 4, c. cxvii.

The court say:

"It appears by the evidence that Graves street, in which the plaintiff's premises are situated, had not before the time in question been paved or flagged. Part of the houses in the street had been built recently. The state of the street was such as to give jurisdiction to the commissioners to proceed under §§ 55 and 56; but, as those sections were taken not to justify the acts that had been done, the defendants resorted to § 53 by their plea, and raised the question whether § 53 applies to a street in the circumstances of Graves street; and *we think it does not.*

"Section 56 enacts that the commissioners, before they *pave* a street in the state of Graves street, which we would call a *new* street, must give notice to the occupiers or owners to do the *paving* in a stated manner, and it enacts that, if the owners make default for six months after such notice, the commissioners may do the *paving* and charge the expenses to the occupiers or owners.

"Section 54 enacts that, when a *new* street has been completed as to *paving* and some other requisites, the commissioners may * * * take the *repair* for the future.

"Section 58 enacts that when a *new* street has been completed as to *paving* and the other requisites by the commissioners, and the owners or occupiers have paid the expense, the commissioners may * * * take the *repair of the paving* for the future.

"The provisions in those sections apply specifically to a *new* street, such as Graves street; and the commissioners intended at first to act under them, as they gave the notice under § 56, and proceeded to do the work themselves shortly after the expiration of six months from the notice; and, *if they had kept within the provisions of these sections, they would have been justified;* but, IN CUTTING DOWN THE STEEP ASCENT AND LOWERING THE LEVEL OF THE WAY, THEY WENT BEYOND THE POWER GIVEN UNDER THOSE PROVISIONS, and have therefore adapted their plea to the fifty-third section, which enacts that the commissioners may from time to time cause the *present and future streets* to be paved and repaired, *and the ground or soil thereof to be raised or lowered or altered in such manner as they shall think fit.* We think this section does

not apply, because it is generally applicable to *all* streets, and it is followed by the special clauses applicable to *new* streets, such as Graves street, which would be in part inoperative if the general clause included the streets specially provided for. It seems to us that § 53 applies to *old* streets, &c.

"Even if the fifty-third section had applied to Graves street, it seems to us that it would not justify the lowering of the level for a purpose *unconnected with paving or repairing pavement;* the power of raising and lowering the level is so mentioned as to be united by the context with *paving and repairing;* also, as there is no power for compensating individual loss *where the level is altered for the public benefit*, it seems improbable that a general power of altering levels to an *unlimited* extent should have been intended; *for the damage resulting therefrom may be very serious;* and, if an *unlimited* power was not intended the context leads to the conclusion that the power was limited to the requirements for *paving and repairing pavement;* and, *if the power be so limited, it would not afford a justification.* The result is that the plaintiff is entitled to a verdict."

Brown *vs.* Clegg, 16 Adolphus & Ellis R. in Q. B. (N. S.), 686; 16 Q. B., 681.

Just here we call your attention to the important fact that there is a broad distinction between, on the one hand, *keeping* a highway in the *same condition* in which it has been all along (*i. e., maintaining* it), or in *restoring* it to its *previous condition* in case it deteriorates therefrom (*i. e., repairing* it), which right of so *maintaining or repairing* the highway is an incident of highway; and, on the other hand, *changing* its condition from what it has been all along, as by *grading, altering, or improving* the highway so as to render its condition *different from* and *better than* it had ever been before, which right of so *grading, altering, or improving* the highway is *not* an incident of highway. There is a great difference between the one and the other.

In Reid *vs.* Knox a bill was filed to compel the trustees of the first district of west of Sterlingshire turnpike roads to

raise the level of a part of the highway so as to prevent inundations.

The trustees were bound by the act of 3 and 4 Vict., c. 101—

First, to *repair* and *maintain* the road;

Second, to pay the interest of the debt;

Third, to pay off the debt;

And, lastly, to *improve* and *alter* the road.

The trustees contended that "*the raising of the level to prevent inundations* was *not repairs*, but *improvements*, and until the debt upon the road was paid off *these improvements* could not be made."

The court say:

"The River Kelvin, in wet weather, at all seasons of the year, and several times in every year, overflows its banks near Springfield, and the portion of the road in that quarter lies so low, &c., that for the distance of more than a quarter of a mile, or thereabouts, in the neighborhood of the bridge, it is submerged on the occasion of floods to the depth of 3 and sometimes even 4 feet. This flooding, as was stated by Mr. Walter Paul, the surveyor of West Sterlingshire roads, in a report presented by him to the respondents in October last, is 'periodical,' and he also explains that these floods are of long standing, 'and the oldest inhabitant cannot recollect of any other state of things.' The consequence is that the road in the neighborhood of Springfield bridge is often impassable, and the public, being thus obstructed in the use of the road, are obliged to take other and very circuitous ways for the prosecution of their business. * * * Here the complaint is not that the road at Springfield bridge is too narrow, but that *the level is too low*. Now that may be a great objection to a road, but *it is an objection that goes to the original construction of the road*. To *alter the level* may be a very proper object for the trustees to have in view if they can afford at some time to do it, but it is a totally different matter to say they are obliged to do so.

"This is an *alteration* of the road from the form in which it was deliberately made at its *original construction*. This is *not a repair;* it is *an entire change and alteration*, just as much as a *lateral* deviation or cutting would be.

"In doing this the trustees never could be said to be

'*repairing and maintaining*,' they would be '*improving*.' * * * I find in the local act a marked distinction is drawn between *repairing* and *altering*. The trustees are bound to apply a part of the revenue, first, to the *repairing* of the road; second, to pay the interest of the debt; next, to pay off the debt itself by means of a sinking fund, and, last of all, they are to *alter and improve* the road. The purpose of this part of the petition is to compel the trustees to apply their funds in *alterations and improvements* before the debt is paid off."

Reid *vs.* Knox, clerk to the trustees of the first district of west of Sterlingshire turnpike roads, 33 Sc. Jurist, 552.

We submit that by an unbroken line of authorities and the settled law of England the duly constituted public authorities cannot *grade or improve* a public highway (as contradistinguished from *repairing or maintaining* it) without express statutory authority authorizing and empowering them *to grade or improve* the same. Such was the *common law* of England, and such always was and still is the law of England, where no act of Parliament applies to the particular highway in controversy, or where the act, if there is one, confers no right or power to grade or improve the highway.

The common law is expressly adopted as the law of Maryland and of this District except so far as the same has been changed or altered by statutes in force in this jurisdiction. Such being the law as derived and inherited from our mother country, it seems our public authorities cannot justify *grading or improving* a public road or highway in which they have a mere right of way or easement without showing some statutory right or power so to do.

In a New Hampshire case the court say:

"Even the right of the public authorities to remove *gravel*, sand, rock, or other materials from the traveled part of *any highway*, without damage or injury to the adjoining land, to any other part of *the highway*, for the purpose of repairing

and grading the same, would seem in this State *to depend on the provisions of the statute specially conferring this power* upon surveyors of highways."

Blake *vs.* Rich, 34 N. H., 285.

We also call your attention to the following decisions in support of this proposition:

A railroad charter declared that their road might be built upon any highway. Said railroad showed the express consent of the municipal authorities of the village, as well as of the city of Syracuse, to the occupation of a certain highway or street in the village of Syracuse. The court say:

"The prinicipal question, &c., is whether the State and municipal authorities combined could confer upon the railroad company the right to construct their road upon this street, without obtaining the consent of the plaintiff or making him compensation. If the railroad *encroaches in any degree upon the plaintiff's proprietary rights*, then it is clear that the constitutional inhibition, which forbids the taking of private property for public use 'without just compensation,' applies to the case. It is conceded that, by the dedication, the public acquired no more than the ordinary easement or right to use the premises as a highway; and that the plaintiff continued the owner in fee, &c., subject to this easement; but it is contended that the taking and use of the street by the railroad company does not encroach upon the reserved rights of the plaintiff, &c. * * * It will not be seriously and cannot be successfully contended either that the dedication of land for a highway gives to the public an *unlimited use*, or that the legislature have power to *encroach* upon the reserved rights by materially *enlarging* or *changing* the nature of the public easement. Any one can see that to convert a common highway running *over* a man's land into a railroad is to impose an *additional burden* upon the land and greatly to impair its value. The argument is that as he has consented to the laying out of a *highway* upon his land, *ergo*, he has consented to the building of a *railroad* upon it, although one of these *benefits* his land, renders *access* to it *easy*, and *enhances* its price, while the other makes *access* to it both *difficult and dangerous*, and renders it comparatively *valueless*. Were the transaction be-

tween two individuals, every one would see at once the injustice of the conclusion attempted to be drawn. It is the public interest supposed to be involved which begets the difficulty, and it is just for this reason that the Constitution interferes for the protection of individual rights, and provides that private property shall not be taken for public use without compensation; a provision no less necessary than just, and one which it is the duty of the courts to see honestly and fairly enforced. It follows that the defendants, in constructing their road upon Washington street without the consent of the plaintiff, and without any appraisal of his damages or compensation to him in any form, were guilty of *an unwarrantable intrusion and trespass* upon his property, and that he is entitled to relief."

Williams *vs.* R. R., 16 N. Y. (2 Smith), 100, 108 to 111.
S. P., Trustees *vs.* R. R. Co., 3 Hill (N. Y.), 567 to 569.

In Kelsey's case it was held the proper public authorities by virtue of their right of highway could not construct a sewer in a public street of Brooklyn, the court saying:

"The authorities are uniform, that by dedication for the purposes of a public highway, no rights are acquired by the public except those of passing and repassing *over the surface of the soil*, and such as are incidents thereto. * * * No case has been found in the books, which warrants the assumption that by virtue of it *the soil of the street can be dug up or removed*, &c. * * * All the cases referred to *negative* any such position. The dedication, therefore, by the plaintiff, of the land * * * to the use of the public as a public street, did not authorize the defendants to enter upon that land for the construction of a sewer therein."

Kelsey *vs.* King, 33 How. Pr. R. (N. Y.), 47 to 50.

In Pennsylvania, "from the first settlement of this country, both under the proprietors and the State, the invariable usage and law was, in the sale of vacant land to any applicant, *to add 6 acres* for every 100, for *roads*, &c. *These 6 acres were never paid for by the applicant;* they were not any particular and specific or designated *6 acres*, but they were thrown in, that whenever the Commonwealth thought a

public road necessary, through any part of the State, it might make it without interfering with the private right of any individual. The right of the State to take *6 acres* out of every 100 acres sold is not an *implied right*, but an *express reservation*. It infringes no private right, nor does it injure any man by using this right."

Comm. *vs.* Fisher, 1 Penn. R., 464, 465.
P. and T. R. R. Co., 6 Wharton's R., 44.

In Pennsylvania, therefore, when land is taken for public roads of any kind no constitutional question is or can be involved; only consequential damages can arise, which she usually requires to be compensated for as a matter of justice, but is under no obligation to do so, because the soil is already *owned* by her or *held in trust* for her, and has *belonged* to her all along, even before it is taken for such public road, being gratuitously thrown in *for this very purpose* in all the original grants.

Yet in Pennsylvania, where a *turnpike* road was constructed over ground of individuals who in 1825 receipted in full for damages sustained by its construction, and in 1849 an act was passed authorizing the *turnpike* company to sell its corporate rights to a *railroad* company and the latter to purchase the same, and where the act of incorporation of the railroad company provided for the valuation of land occupied by the road and of all damages which the owner or owners shall sustain or may have sustained by reason of its construction, it was held that the obligation imposed on the *railroad* company to pay damages was a proper exercise of legislative authority when conferring on that company an *additional privilege*.

And that one of the original owners of the land and her grantees were not estopped by the receipt of the *turnpike* company from claiming such damages from the *railroad* company by reason of the construction of the *railroad*, which, in passing through the *locus in quo*, made an EXCAVATION

OF SOME DEPTH, BY WHICH ONE PORTION OF THE PROPERTY WAS CUT OFF FROM OTHER PORTIONS, and certain houses built on the edge of the turnpike were isolated and rendered inconvenient of occupation, though the *railroad* occupied no more of the *locus in quo* than was contained within the limits of the *turnpike* road.

The court say:

"It thus happened that what had been a *convenient appendage* as a road of general use, and *a means of facilitating intercommunication*, was rendered a positive *obstruction* in the enjoyment of the appellant's property as it had been before used. * * * The court below thought such remuneration could not be awarded, because the *surface* occupied by the turnpike road having been dedicated to public use by legislative authority for every purpose of passage and travel, the community had acquired an interest therein, and no ground having been t[illegible] for the purposes of the railroad, *other than was before a[illegible]opriated by the turnpike company under a purchase of the right of way*, the owners of the soil cannot with propriety complain of a *mere change in the mode of user*, which *encroached no further* on their actual possession.

"If this reasoning be correct, the case presents the anomaly of substantial injury inflicted without corresponding remedy, for all the numerous laws passed upon the subject of public improvements by canals and roads, and among them that incorporating the appellees, recognize the possibility of damages incurred *beyond the mere appropriation of the soil* necessary for the purpose. The basis of compensation is not to be measured solely by the value of the land taken for public use. The advantages likely to accue, and the disadvantages to be suffered, enter largely into the estimate. These considerations may, and frequently do, swell the sum awarded as remunerative far beyond the worth of the *surface* occupied, &c. *One mode* of occupation may be attended with *little or no inconvenience* to the owner of the soil, while *another* may visit him with injuries of a *serious character*, in reference to the nature of his possessions and the manner of their enjoyment.

"Nay, while *one* species of improvement may *facilitate* his business or *add* materially to the value of his property, *an-*

other may *hinder* the one, and largely *detract* from or entirely *destroy* the other.

"The very case before us is illustrative of this, if any reliance can be placed in the correctness of those who measure the amount of injury severally occasioned by the *turnpike* and *railroad*. * * * Had a railroad been originally made over the lands of the appellants, creating the injury they now complain of, an omission to provide for remuneration to the owners would have encountered universal disapprobation. * * * What difference can it make in principle, and so far as the dictates of right are involved, whether a railroad is laid down on an already made *turnpike* road, or constructed over a surface newly prepared for the purpose. * * * Why should a difference of practice be tolerated because such injury flows from a *railway* engrafted upon a previously made *turnpike?* There is, obviously, no reason for such a distinction, as perhaps there would have been, had a property in the soil passed to the earlier company by virtue of its payment of damages.

"The case might then have fallen within the principle which recognizes the power of a proprietor to put his possessions to a profitable use, though such user may involve an incidental injury to a neighbor. * * * But here, the soil over the *surface* of which the *turnpike* ran remains in the original owners or their alienees. During its appropriation to the purposes of the *turnpike*, those owners might have maintained an action of trespass against the directors of the corporation, had they attempted to construct over its site a *railroad*, without special authority, or turned it to any other use than that authorized by their charter. * * * If, then, by the payment of the original damages the *first* company purchased under its charter but the right of constructing and using a turnpike *over the surface of the soil*, it is obvious it could of itself, unassisted by legislative action, have conveyed no interest *beyond this* to the *second* company.

"As alienees, the latter corporation *could not have excavated a shovelful of earth but at the hazard of an action.* Their right to do so is something *greater* and *different* from any interest *derived* or privilege *purchased* from the *older* company. It is therefore to be regarded precisely as though it were an original grant by an exercise of the legislative power, and its enjoyment is subject to all the conditions and

restrictions to which the legislature has seen fit to subject it."

Miffin *vs.* R. R. Co., 16 Pa. St., 191 to 194.

In an Iowa case the court say:

"An easement is defined to be a liberty, privilege, or advantage in land, *without profit*, existing distinct from an ownership in the soil. * * *

"A highway is defined to be nothing but an easement, comprehending merely the right of all the individuals in the community *to pass and repass*, with the incidental right of the public to do all acts necessary *to keep it in repair*. The easement does not comprehend any interest in the soil, nor give the public the legal possession of it; the right of freehold is not touched by establishing a highway, but continues in the original owner of the land in the same manner it was before the highway was established, subject to the easement. * * * A man may have a right of way *without having an interest in the fee*, and if *such an one* interfere with the soil *under the surface* or uses it in any other way than for *passing* or *repassing*, he is answerable as a trespasser to the owner of the fee. The public have the right of *passing and repassing* and of digging *for the repair of the road*, but subject to this easement, the exclusive ownership of the soil, the freehold and all its profits, remains in him who owned the soil before the highway was laid out, and he may maintain trespass, or waste, or recover possession, subject to the easement."

The City of Dubuque *vs.* Maloney, 9 Iowa, 456.

Where a *plank road company*, by legislative authority and with the consent of the county court, located and made a *plank road* over and upon a *county road* the court *held* that said plank road company was liable for damages to the owner of the soil for making its plank road *with its excavations*. The court, Scott, J., say:

"The law, for the convenience of the community, has appropriated portions of the lands of individuals to be used as public roads or highways. Subject to this use or easement of the public, the soil over which the road passes remains

in the owner in the same manner as though no appropriation of it had been made. When the land of an individual is taken for a road, whether he gives it voluntarily or sells a right of way over it, by claiming and receiving compensation, he must be understood as giving to the public power over it TO AN EXTENT THAT WILL ENABLE IT TO CONSTRUCT SUCH A ROAD AS THE LAWS IN FORCE AT THE TIME REQUIRE OR PERMIT TO BE MADE. The grant of a right of way for *one purpose* will not authorize the use of a road for *another and different purpose.* One may be *willing* that there may be a right of way across his land for *one purpose* and very *unwilling* that the same right should exist for *another purpose.* So an authority to build *one kind* of road would not be a warrant for making *another kind* of road *which would increase the inconvenience and injury resulting to the owner.*

"At the time it is claimed this land was condemned for a highway the law in force required that all roads should be *laid out and cleared* according to the utility of the same, and directed that all roads should be *cleared of trees* 1 *foot through,* and *of brush and limbs of trees* which might incommode horsemen and carriages, and that *no stumps should exceed* 1 *foot in height,* and that all *wet ground and small water-courses* should be *causewayed* or *bridged* in such manner as to enable horsemen and carriages to pass with facility (R. C., 1825, p. 695).

"Such was the *kind* of road for which a party *yielded up his land.* The act under which the defendant proceeded, created corporations for the purpose of *making plank roads;* with the consent of the county court it empowers the corporations to *locate* their roads on any portion of the *county and State roads,* &c., &c.; the manner of constructing their roads was to be determined by the boards of directors of the corporations, in such a mode, however, as to 'SECURE AND MAINTAIN A SMOOTH AND PERMANENT ROAD,' the track of which to be made of plank or timber, or partly of both or macadamizing (Sess. Acts 1851, p. 260).

"If the defendant has used the right of way taken from the plaintiffs, or those under whom they claim, *for purposes injurious to them, and not contemplated at the time the right of way was taken,* there is no reason why it should not compensate them for the injury resulting from the use of the right of way in a manner *different* from that intended when it was *first taken.* Justice requires that the defendant should pay the *difference* between the injury resulting from the use of

the way for a *plank road*, and the use of it as a *common State or county road.*

"It is clear that PLANK ROADS REQUIRE THE REMOVAL OF MORE SOIL, and are constructed in a manner *different* from that in which *county roads were made* WHEN THIS RIGHT OF WAY WAS FIRST CREATED, and that the work put upon *plank roads* greatly *exceeds* that which the law required to be put upon *county roads.* * * * We should not so construe an act of the General Assembly *as to make it violate the Constitution.* The consent of the county court can only operate to the extent of the power that court had over the road. If AN INCREASE OF THE RIGHT TO THE SOIL of the road *is required* for a *plankway*, why should not the owner, TO THE EXTENT OF THE INCREASE INJURIOUS TO HIM, have a right to damages as well as any other owner?"

Williams *vs.* N. B. Plank Road Co., 21 Mo., 583, 584;
S. P., Road Co. *vs.* Renfroe, 58 Mo., 273, 274.

In this connection we call your attention to the decision rendered in 1871 by the court of appeals of Maryland in Peddicord's case (34 Md.). In that case the act of 1787, ch. 23, appointed commissioners to examine, survey, lay out, and mark a public road from Baltimore to Fredericktown "66 feet wide, *and to cause the same to be cut down*, and well cleared 52 feet wide, and grubbed and stoned 40 feet wide," and to agree with proprietors of lands through which it passed on compensation for damages occasioned by the passage of said road through their lands, or in case of inability to agree, then to cause the same to be ascertained by an inquisition, and provided for the erection of turnpike gates and the collection of tolls (p. 471). The road was to be forever afterwards taken, held, and adjudged in all courts of law and equity a public road and common highway (p. 472). The act of 1801, ch. 77, recited that said road had been surveyed, laid out, marked, and bounded according to the provisions of said act of 1787; that the same was opened and supported at a very great and expensive charge to the county, and provided new means for managing the same and keeping it in better repair. Among other things,

* * * that the supervisor, &c., should cause it to be cleared 66 feet wide, and 21 feet at least bedded with wood, stone, gravel, or any other hard substance. The road to be made by the act of 1787 by straightening and widening the old road and by making the new; plats were to be returned, &c. (p. 471).

Section 5 of said act of 1801 contemplated that the old road, on the bed of which the location of the new road ran, was 20 feet wide, and provided for ascertainment of damages to land-owners for the additional 46 feet for the new road, as shown by the plat then returned and filed, or for the 66 feet where the new road had not been located on the bed of the old road, either by agreement with the land-owners or by condemnation. Both by this act and the act of 1787 the jury of inquisition was to take into consideration the *convenience and benefit* and the *disadvantages* occasioned to owners of land *by reason of the passage of said road through their lands* (pp. 471, 472).

By the act of 1804, ch. 51, the president, managers, and company of the Baltimore and Frederick Town Turnpike road were incorporated with power to make a turnpike road *over and upon* the bed of the road mentioned in and provided for by the acts of 1787 and 1801. The seventeenth section of this act of 1804, ch. 51, provides that 20 feet *at least* shall be bedded with wood, stone, gravel, or other hard substance, well compacted together, "*and so nearly level in its progress as that it shall in no place rise or fall more than will form an angle of four degrees* (4°) *with an horizontal line,*" and which should be forever, during the continuance of said corporation, maintained and kept in good and perfect order and repair. The nineteenth section of this act of 1804 provides for the collection of tolls by the company (p. 472). The act of 1809, ch. 2, confirms said turnpike road. The act of 1811, ch. 202, is a further confirmatory act (p. 473).

By the act of 1860, ch. 34, the appellee was incorporated with power to construct *a horse passenger railway* from Balti-

more to Ellicott's Mills, and by the sixth section was authorized, provided it could *obtain the assent* of the Baltimore and Frederick Town Turnpike Company, which *consent* the latter company was authorized *to give*, to construct the railway upon the bed of the turnpike road, *with power to alter the grade thereof*, subject only to such regulations and conditions as might be prescribed by the turnpike company. On March 11, 1861, a contract was entered into between appellee and the turnpike company, by which, among other things, *the former was empowered to construct its railway on the bed of the latter, &c.* * * * The ordinary travel on the turnpike is not to be interfered with. The railway company is authorized *to grade* the turnpike bed, and when this is done the whole width of the latter *is to be graded*, and all costs, charges, expenses, and damages connected in any way with the change are to be borne by the railway company (p. 477). The railway company *did grade* the bed of the turnpike where the property, of which the appellant is lessee, abuts on it, *to the same angle to which the turnpike company was required by its charter to grade the same, &c.* The consequence was to change the condition of the turnpike bed as it had existed from the construction of the turnpike to that time, to the inconvenience of the enjoyment of the appellant's property (p. 478).

The court say:

"The questions touching this case arising on a review of these several acts of assembly are, what were the powers of the Baltimore and Frederick Town Turnpike Road Company *in respect to grading the bed of its road* in part or in whole. * * * It is clear that whilst the company was *obliged to grade* 20 *feet* in width it was *authorized to grade the whole* 66 *feet* if it thought best. To what *extent* was it authorized to *cut down and fill up the road-bed* in the process of *grading?*

"The act of 1787 *required* the commissioners appointed thereby to CUT DOWN and well clear 52 feet of the 66 feet of width of the public road and common highway. THE EX-

TENT OF CUTTING DOWN IS NOT SPECIFIED. *The duty was to cut down, as much as was practicable, until the best condition of road attainable was reached, as was useful and beneficial to the road, within limits of reasonable cost.* * * * Their power *to cut down* was not confined, we think, to the *original* making or opening of the road. It was a power and duty, *always continuing* in those having charge of the road, to *cut down* from time to time, as they might be able, the road-bed, UNTIL AS NEAR A LEVEL WAS ATTAINED AS MIGHT BE. * * * The commissioners under the act of 1787, and the other authorities provided by the act of 1801, had the *right*, we think, and it was their *duty*, to *cut down* the bed of the road, from time to time, *to any extent* that was useful and beneficial to the road, and promoted the convenience of the public in using it, and this *right* and *duty* were *transferred to* the president, managers, and company of the Baltimore and Frederick Town road by the act of 1804.

"Their charter *obliged* them to discharge this duty *to the extent* that the 20 feet to be stones, &c., should in no place rise or fall *more* than would form an angle of four degrees (4°) with an horizontal line, but *did not relieve them* from the *duty*, or perhaps more certainly *did not take from them* the *right*, to so construct the road as that the angle should be *so much less* as the convenience of the public might demand and as might be accomplished by the use of reasonable means. * * * Whether the right of way under the acts of 1787 and 1801, or either, were acquired by purchase, condemnation, or dedication the result is the same. It was acquired under the act of 1787 or of 1801. The recital to the act of 1801 indicates that it had been *then* acquired.

"The eleventh section of the act of 1801, shows *that it had been before that time acquired*. In either case, the purchase, grant or dedication was of the right of way sixty-six feet in width, for any and all the uses and purposes to which the company *was authorized by its charter to apply it*, and the adjoining owners of property held *cum onere*, and transmitted their title *cum onere*. Our conclusion is that the *turnpike company* acquired by its charter, the right *to grade*, &c., in the manner that would promote the benefit and convenience of the public, for the purpose of a public highway, *the whole sixty-six feet of the roadway*, or any part thereof, *not less than twenty feet wide*, and to *grade* the same to any angle *less than*

four degrees (4°), *and that it retained that right up to the contract entered into between it and the appellee*, and that *the holding of the appellant was subject to that right by the company.* * * * The argument of *appellant's counsel* was that this change of grade was made in pursuance, and by virtue, of the power conferred by the act of 1860, and that it was incompetent to the legislature to grant the power without providing compensation for the land-owner. * * * In this case the power to change the grade was derived, *not from the act of* 1860, in our opinion, but *from the turnpike company*, by virtue of the *contract* offered in evidence. The turnpike company *had the power to change the grade*, and it was authorized by the act of 1860, *to assign its power to the railway company.* So far as *change of grade* is concerned, the railway company only did, by permission of the turnpike company, *that which it was the duty of the latter, under its charter, to do*, and that which promoted the convenience of the public in the use of the turnpike as a public highway.

"The authority given by the contract was not *to grade* a railway track *only*, which could not have advantaged the highway for public use, but *to grade* the whole 66 *feet*, the reduction of the elevation and depression in which must of necessity make it an easier and better highway. *Compensation* to the land-holder *for this identical act*, that is *for grading to as near level as might be*, and *which should not exceed an angle of four degrees* (4°), had been provided by the Acts of Assembly, *in virtue of which the right of way to the road-bed had been secured*, whether by purchase, grant or dedication. We do not think the appellant is entitled to recover, in this case, on account of the grading of which he complained. * * * The test, &c., to the power of the legislature in the management and control of easements acquired for public highways is that they cannot be diverted to other purposes than those for which they were acquired, *nor enlarged so as to accumulate additional burdens upon the land* or *destroy or impair the incidental rights of the owner*, appurtenant to his land located upon the highway. * * * It has been hereinbefore said that the easement of the turnpike company, attached to the public highway by the acts of 1787 and 1801, before the charter was granted to the turnpike company, included *the right to dig down the hills and fill up the valleys to such extent as might be requisite to attain as near a level as might be*, and by the charter granted to it, it

was made incumbent on the turnpike company so to dig down and fill up as that its road should in no place rise or fall *more* than would form an angle of four degrees (4°) with an horizontal line. *This being the burden to which the land was subjected by its original appropriation to the purposes of a public highway*, and it having been subjected by the railway company, under its license or grant from the turnpike company, to *so much only of that burden* as was the *minimum* which it was the *duty of the latter company*, by its charter, to impose on it, *we are unable to see* the burden on the land *additional* to the burden *originally imposed* by its dedication to the purposes of a highway, or in what manner its value to the owner has been *impaired* by the construction of a railway track, more than if it had been cut down, graded and covered with stone, or other hard substance, by the turnpike company, or how the passage over it of a car on iron rails, for the convenience of passengers, could be more injurious to the land and the rights of the owner, than the passage of an omnibus over the same stone bed."

Peddicord *vs.* Railway Co., 34 Md., 454 to 480.

These decisions, we submit, show very clearly that the public authorities *cannot grade* a public highway as an *incident* of mere highway or as a *common-law incident* of highway, nor can they do so unless power so to do is contained in and be affirmatively bestowed on them by and flow to them from statutory law in force when such right of highway was originally acquired.

It is *not* the law in force *at the commission of the trespasses*, but the law in force *at the time of acquisition of the highway*, that governs, controls, fixes, and determines the rights and powers of the public authorities with respect to the highway as between them and the owner of the soil.

It is hardly necessary for us to say that the doctrine which we have just stated, and which we contend is the well-settled law of the land, in no way conflicts with those cases in which the public owns or has an *absolute* or *fee-simple* title in a highway, as contradistinguished from mere right of way or easement therein. Wholly different principles, of course,

apply and govern where the *fee* of the highway is in the public or in the public authorities.

The doctrine which we have just stated and which we contend for is in entire harmony with and in no way conflicts with that line of cases in which the right of the public authorities to grade a highway was sustained where such highway had been acquired under a statute either requiring or authorizing the public authorities to "*amend*" or to "*improve*" or to "*raise, sink, or alter*" such highway, or to "*amend* the highway in such manner as to make it *safe and convenient*," or to exercise like rights or powers. In Governor *vs.* Meredith (cited in Callender *vs.* Marsh) the statute empowered the commissioners "to pave, repair, *raise, sink*, or *alter* the street," &c. That case does not show or tend to show that a highway can be *graded* without express statutory power so to do. In Callender *vs.* Marsh, the leading American case of this line of decisions, the statute cited and relied on by counsel as conferring, and sustained by the court as conferring, *the right to grade* was the Massachusetts act of 1786, ch. 81, § 1, which provides that "all highways, &c., shall be kept in *repair* and *amended* from time to time, that the same may be *safe and convenient* for travelers, with their horses, teams, carts, and carriages at all seasons of the year" (1 Pick., 419). This same statute, in equivalent and usually in identical or almost identical language in early times, was adopted by and is the law of the other New England States, as well as of various other States, which fact satisfactorily accounts for and explains this whole line of authorities.

In Callender *vs.* Marsh, the court, after citing said statute, say:

"The word *repair* means probably to replace or remake, *reficere*, to restore what has been impaired or injured; but the word *amend* is broad enough to cover anything which may tend to make the road *better*; and this can in no way be done more effectually, than by cutting down a sharp hill and carrying the materials to the foot, so as to reduce the

acclivity of the road. * * * We have only *to look at our statutes*, and we think *they explicitly and clearly give the power to the surveyors*, which was exercised by the defendant in the case before us. * * * The streets on which the plaintiff's house stands had become public property by the act of laying them out conformably to law, and the value of the land taken must have been either paid for or given to the public, *at the time*, or the street could not have been legally established. Being legally established, although the right or title in the soil remained in him from whom the use was taken, yet the public acquired the right, *not only* to pass over the surface in the state it was in when first made a street, *but the right also* to *repair* and *amend* the street, and for this purpose to dig down and remove the soil sufficiently to make the passage *safe and convenient*."

Callender *vs.* Marsh, 1 Pick., 429, 430, 431.

You will observe that the *right and power to grade* the highway is not rested or based on the idea or theory that such right to grade is an *incident* of mere highway or a *common-law incident* of highway, but is sustained *solely* upon the ground of express statutory law in force *at the time of acquiring* such highway, *authorizing compensation then* for *subsequent exercise* of such powers.

In the case at bar the record states that the earliest mention of Harewood road (formerly Duley's lane) is in 1801, a stake being mentioned as standing in 1801 in the middle of what was then called Duley's lane and is now called Harewood road, on the common boundary line between James White Sr.'s Pleasant Hills tract and Henry Duley's Turkey Thicket tract (Rec., pp. 22, 23). There is nothing further to show when Harewood road or Duley's lane was first laid out or opened.

If ever condemned, laid out, or opened as a public road or highway at all, it must have been prior to that time (1801), for what is now called Harewood road, then called Duley's lane, was in 1801 an *existing* lane or road, as we have just pointed out. (Rec. pp. 22, 23).

What was our law at that time—*i. e.*, in 1801?

The law then—that is to say, in 1801—in force in this District, and which remained the law of this District for many years thereafter, was the ancient Maryland statute of 1704, which enacts as follows:

"That all public and main roads be hereafter *cleared* and *well grubbed*, fit for travelling, 20 foot wide."

Maryland act of 1704, ch. 21, § 2.

We submit, therefore, that even if Harewood road was a public road or highway, yet the public authorities could only exercise over it the right and power to keep it "*cleared* and *well grubbed*," as aforesaid, and *could not* exercise the *greater* and *more burdensome* right or power of *grading* it without being liable as trespassers.

PLAINTIFFS' SEVENTH PRAYER, which was refused by the court, is as follows:

"The jury are instructed that the right to grade a highway or to excavate the soil thereof or to dig into or remove the soil thereof to a greater extent than is necessary to repair such highway is not a common-law incident of highway nor a necessary incident of a public county road or country highway, and that the owner of the soil over which a public county road or country highway passes cannot, as an incident of such a road or highway, be subjected to any such more burdensome right, easement, or servitude where the law under which such highway was acquired neither authorized nor provided for the owner of the soil being compensated for such more burdensome right, easement, or servitude, and the exercise of such more burdensome right, easement, or servitude was not within the contemplation of the parties at the time when such highway was acquired; and if the jury believe from the evidence that the defendant did the acts complained of which are in evidence, and in doing the same exercised a right, easement, or servitude more burdensome to the owner of the soil than any right, easement, or servitude which the defendant had then already acquired, then the jury are fur-

ther instructed that the defendant could not lawfully increase its right, easement, or servitude so as to make the same more burdensome to the owner of the soil without appropriate condemnation proceedings or making just compensation therefor to the owner of the soil" (Rec., pp. 41, 42).

Upon the evidence in this case, and the statute of 1704, *supra*, and the authorities cited or referred to above, we respectfully submit that this prayer should have been granted; that the court erred in refusing it, and that the court's refusal thereof and ruling in respect thereto was very disadvantageous to the appellees and very advantageous to appellant in the case at bar.

PLAINTIFFS' THIRD PRAYER, which was refused by the court, is as follows:

"If the jury believe from the evidence that a common and public highway for all persons to go, return, pass and repass on foot and with horses and cattle and carriages at all times of the year at their free will and pleasure existed over the land of the plaintiffs' testator at the time of the doing of the acts complained of, which have been given in evidence, yet if the jury believe from the evidence that such highway was only acquired by prescription or long use, exercised by going over the *surface* of the ground and keeping the *surface* of the ground in repair for *superficial* use without digging into the soil further than necessary for *such repair*, then the jury are instructed that the *extent of the user* is evidence only of a right *commensurate with the use*, and that *such use* over the *surface* of the ground and *such keeping* of the *surface* of the ground in repair for such *superficial* use, no matter how long continued, gives no right to any *greater* or *more burdensome* servitude, and gives no right to dig into the soil to any *greater* extent or for any *other* purpose than is necessary to keep such highway in such repair, and that the right to excavate or dig into the soil of a highway acquired by prescription or long use to any *greater* extent or for any *other* purpose than is necessary to keep it in *such repair* can only be acquired in such a highway where such rights have *themselves* been used and exercised for the full period of 20 years, and have *themselves* been used and exer-

cised *adversely and uninterruptedly for that period under a claim of right*" (Rec., p. 40).

In the case at bar the public authorities till the trespasses in 1880 and 1881 never at any time exercised or attempted to exercise any right to grade Harewood road or to do any such act or acts in said road as those complained of in this action. The record not only contains no evidence whatsoever of anything of the kind having been done prior to that time, but also contains clear affirmative evidence that nothing of the sort ever had been previously done or attempted. The record contains the following evidence upon this subject, viz:

"That no changes were ever made in the *surface* of the road *or grade thereof* by the District authorities *prior to the time* or *from the time* the plaintiffs' testator acquired said land *until the alleged trespasses in* 1880 *and* 1881 beyond such ordinary *superficial repairs* to the road as were made *after* the late civil war" (Rec., p. 28).

"That *after* the late civil war, *but not before* that time, *ordinary superficial repairs* to said road were made by the public authorities, and after 1865 no objection was ever made by plaintiffs' testator to the acts of the public authorities in keeping the road in what might be called *ordinary superficial repair*, when such repairs *were in accord with the idea of plaintiffs' testator as to what should be done*, but *such repairs or improvements were prevented by him when not in accord with his desires or views as to the needs of the road;* that *after the war* and up to the time of the trespasses complained of public-road supervisors would from time to time send men upon the road and *repair* it—that is to say, *restore it to the condition it had previously been in*" (Rec., pp. 25, 26).

"That about 1878, prior to the trespasses complained of, plaintiffs' testator *stopped the work* of men employed by George N. Beale, supervisor of county roads, who had been sent there *to make some ridges across the road*, so that water accumulating would drain across to the north side of the road; that said work *not being in accordance with the wishes*

of plaintiffs' testator, he objected to it, and thereupon said ridges were removed by said supervisor of highways" (Rec., pp. 23, 24).

Such is the proof in this case, and it seems to us conclusive that the right *to grade* or *to do the acts complained of* had not been acquired by prescriptive use or long use, because such *right* not only had not been *exercised adversely* for the prescribed period of twenty years, but had not been *exercised at all* before the trespasses complained of and sued for in this action.

So much for the facts. As to the law the authorities fully support the proposition of law contained in plaintiffs' third prayer.

Mr. Elliott in speaking of highways acquired by prescriptive use or long use, says:

"The owner cannot be deemed to grant *a greater estate* than that which the *public use measures*, for, as the *use* is the *foundation* of the public *right*, it necessarily determines its *extent*."

"If the right to the way depends solely upon *user*, then the width of the way and the *extent* of the *servitude* is measured by the *character* of the *user*, for *the easement cannot be broader than the user*."

Elliott on Roads, pp. 110, 136.

And Mr. Washburn says:

"It may be further remarked that where a way is claimed by prescription the *character* and *extent* of it is *fixed* and *determined* by the *user* under which it is gained. 'The *extent of a usage of a way* is evidence only of a right *commensurate with the use*.'"

"If the grant is lost *usage alone* indicates the *extent* of the way."

"No time of enjoyment less than the term of prescription (20 years) can give one a right of easement in the land of another or raise any presumption in favor of such a right."

"There must, moreover, be what answers in law to an *actual enjoyment* in order to create a prescription. It is laid down as an invariable maxim by writers upon the civil law.

Tantum præscriptum quantum possessum. Prescription acquires for the possessor precisely what he has possessed, but nothing beyond that. *Præscriptiones tantum habent de potentia quantum habent de actu.* And in proving a prescription the user of the right is the only evidence of the extent to which it has been acquired."

Washburn on Easements, 4th ed., pp. 135, 136, 149, 150.

"If the use of the soil as a way is offered by the owner to the public under given conditions, and the public accepts the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand great injustice and hardship would often arise, if, when a public right of way has been acquired under a given state of circumstances, the owner of the soil should be held bound to alter that state of circumstances to his own disadvantage and loss, and to make further concessions to the public altogether beyond the scope of his original intention.

"*More especially would this be the case when public rights of way have been acquired by mere use.*"

Robbins *vs.* Jones, 15 C. B., N. S., *243, 244; 10 Jur., N. S., 239; 33 L. J., C. P., 1; 12 W. R., 248; 9 L. T., N. S., 523.

Fisher *vs.* Prouse, 2 Best & Smith's R., *780; 8 Jur., N. S., 1208; 31 L. J., Q. B., 212.

Allen *vs.* Gomme, 11 Adolphus & Ellis, *769.

This principle or rule of law that the burden cannot be increased to the injury or disadvantage of the owner of the soil applies equally to all prescriptive easements—that is to say, to all easements acquired by a prescriptive use or 20 years' adverse use.

In an action on the case for the diversion and stopping of a river it was agreed by the court that if one had anciently ponds replenished by channels out of a river, *he cannot change the channels if any prejudice accrue to another by that.*

Duncombe *vs.* Randall, Hetley, 34; 6 East., 219, note *a*.

In a similar case it was *held*, "he may *cleanse*, though he cannot *change* or *enlarge* them." The court saying:

"The defendant, indeed, might have *cleansed* the pits, *keeping them as they were before*, but cannot *enlarge* them. If I have a right from usage as *currere solebat*, I have the *right* in such a manner as the *usage* has been. As to *inconvenience* to *defendant* it is nothing, and might be alleged in every such case as this, and the maxim in Hetley, 34, is exactly applicable to the present case, *sic utere tuo ut ne laedas alieno.*"

Brown *vs.* Best, 1 Wilson, 175; 6 East., 219, note *a*.
S. P., Bealey *vs.* Shaw, 6 East., 215 to 217.

So in Mrs. McCall's case it was *held*—

"A tolerated or permissive user of an easement can never ripen into a title by prescription while a user which is adverse, independent, or as of right, if continued for a period corresponding with the statutory bar to a right of entry upon land, will confer an absolute right; but the use of a ditch and levee on a party's own land, which is *in itself rightful*, cannot confer a *prescriptive* right to *injuriously overflow* the lands of an adjacent proprietor many years afterwards, when the ditch has become gradually filled up with the sand and dirt accumulated and deposited therein by the continued flow of water" (p. 21).

The court in the course of its opinion saying:

"A *partial, harmless flooding*, although exercised of right, could not *by prescription*, ripen into a right to flood Mrs. McCall's lands *more extensively and injuriously.*"

Polly *vs.* McCall, 37 Ala., 30.

In Tennent and Muter's case, decided in 1831, the original lease, as taken by those under whom Tennent claimed, had a clause which followed the disposition of the ground, giving them liberty "*to collect the water of the several springs on the lessor's lands called Merchants' House, and their other adjacent lands called Western Craigs, and to convey the same, in open or closed ditches, through the said lands to the lands*

hereby leased, without molestation or hindrance, forever." This clause appeared in all the subsequent titles, and in virtue thereof Tennent and those under whom he claimed had for a considerable time employed the water drawn from these lands in the operation of a brewery situated on their leasehold called the Well Park.

Lately, however, Tennent set workmen *to bore a rock* in the bottom of a quarry on part of the ground of Western Craigs called Broompark, which had become the property of the respondent Muter, under titles *reserving to the proprietor of the Well Park the right of collecting water in precisely the same terms as the servitude was expressed in Tennent's title.*

Muter having interrupted the *boring* in his quarry, Tennent filed a bill of injunction.

The Lord Ordinary pronounced this decision:

"That in virtue of the titles of the parties respectively the complainer is entitled to collect the water in the several springs in the respondent's lands of Broompark, and to convey the same, in open or close ditches, through the said lands to the lands belonging to himself; and in so far grants the injunction against the respondent molesting or troubling the complainer in the above operations:—*but that the complainer has no right to bore for water, or by any such artificial operations, to bring water to the surface, for the purpose of being collected and conveyed to his own lands; and to that effect refuses the injunction, &c.*"

The court adhered to this decision, Lord Justice Clark saying:

"I have no difficulty when I read the clause in the titles, which gives right to do no more than collect *superficial* water. *It is quite extravagant to claim a right to bore by means of machinery,* as this might be carried to an *indefinite extent,* and be exercised so as to become a *positive nuisance.* The other judges *concurred.*"

Tennent *vs.* Muter, 9 S. and D., 586 (9 Shaw's cases, 586).

In an action of trespass *q. c. f. for setting up a capstan and reel on plaintiff's land,* &c., the defendants proved and contended that the *locus in quo* was a sand beach on which, for more than 30 years before suit, they, *without any limitations or restrictions on the part of the owners of the farm,* had exercised the right of hauling their seines and their boats upon the beach, and of fastening their seine ropes and drying their seines upon it, and that they were not liable to the plaintiff in an action of trespass, although a *capstan and reel* were placed there for the first time *within* 15 *years,* if the jury should find that a *capstan and reel* were necessary in carrying on their business of fishing, for the purpose of fastening their seine ropes and drying their seines, and were placed on the beach, where they had a right to fish and to haul their seines and fasten their seine ropes and to dry their seines.

The trial judge instructed the jury as follows:

"If the defendants have proved, that they had used the beach *for* 15 *years* (the statutory time in Connecticut baring entry on land) next preceding the service of the plaintiff's writ, exclusively and peaceably, *in the same manner, and to the same extent,* as they did the three years preceding such service, you are authorized to find a grant from the owner, which authorized the defendants to do the acts they have done. The *justification* must be *sufficiently broad* to cover *all* the acts. The using of the beach to *draw* on, for 15 years, might entitle the defendants to a *right* to use it for *that purpose* in future; yet that would not entitle them to set up fish-houses, to *set up capstans or reels,* or to *do any other act not done before.* Fifteen years' user to *each* is necessary to give the *right* to continue *its use.* If you find agreeably to these rules, that the defendants have justified as to *all the acts* proved or admitted to be done, your verdict will be for them to recover their costs. But if you find, that they have failed to justify *as to any of the acts done,* you will find for the plaintiff."

A verdict was found for the plaintiff. The court above, Hosmer, chief justice, sustained said verdict, saying:

"If the plaintiff had *granted* to the defendants the privilege of going upon his land with a competent number of persons, and drawing their fish seine *by hand*, it would not be pretended, that they would have right to erect *a reel and capstan* on the premises. As little ground is there for insisting, that a user for 15 years, literally conforming to the preceding grant, would admit of any other construction. A *usage*, supposed to be founded on a grant or agreement, determines the *extent* of the *supposed* grant or agreement. The *right granted* is considered as being *commensurate* with the *right enjoyed*. They are different *media*, proving precisely the same fact; and it is because of this identity of proof, that the *usage* is supposed to evince the *grant*. If the *grant* is something *different* from the *usage*, then the *usage* does *not* prove the *grant:* and if it proves it at all, it necessarily proves it throughout. In short, like a seal and its correspondent impression, the *grant* and the *usage* are, in point of proof, precisely and identically the same. It was therefore said, in the argument, with perfect correctness, that the *usage* was the *letter* of the *grant*. * * * I can never admit, that the habit of fishing by drawing in a seine *by hand* authorizes the erection of *a reel or capstan*, or a fish-house, or anything else *not embraced by the usage*. If the controversy between the parties had related to the *mode* of doing an act, I could *not* assent to the principle that even the *mode* could be changed, unless the grant, *as proved by the usage*, would authorize such a construction. The alteration of the manner may not injure the owner of the soil; but he always has right to say *non hæc in fœdera veni;* and what tribunal shall assume a construction which his grant has not authorized?

"The controversy in this case, however, does not respect an unessential mode. The claim of the defendants obviously is to use the property of the plaintiff *more* than the terms of the grant, *as proved by the usage*, ever admitted. A *short* seine may be managed by a few hands and without the apparatus of a *reel or capstan*, but a *long* seine indispensably requires them. A small number of men, *by hand*, can draw in a seine of 20 rods in length; but enlarge it to 80 or 100 rods, and then a capstan becomes indispensably necessary. The defendants claimed the right of an *extensive and material*

use of property *not granted;* and the *principle* stated by the judge in his charge, *in subversion of a demand so inadmissible, was entirely correct.*"

Hart *vs.* Chalker, 5 Conn., *312 to 317.

Upon the evidence and authorities to which we have referred, we respectfully submit that the court should have granted plaintiffs' third prayer, and erred in not doing so, and that its refusal of said prayer was very disadvantageous to the appellees and very advantageous to appellant.

XI.

WHETHER THE PUBLIC AUTHORITIES HAVE OR HAVE NOT POWER TO GRADE A HIGHWAY, THEY CANNOT LEGALLY GRADE THE SOIL BEYOND THE WIDTH OR LIMITS OF SUCH HIGHWAY WITHOUT EXERCISING, ACCORDING TO LAW, THEIR LAWFUL POWER OF EMINENT DOMAIN BY PROPER CONDEMNATION PROCEEDINGS AND MAKING JUST COMPENSATION.

It is obvious that a right of highway, with all its incidents, whatever they may be, cannot itself confer or give power to do anything outside of the boundaries or beyond the limits of such highway.

To legally excavate or grade the soil outside of the boundaries and beyond the limits of the highway without agreement with or consent of the owner of the soil, the public authorities must first resort to and exercise what is commonly called the power of eminent domain by legally condemning for public use, according to law, such extra or extraneous private property.

PLAINTIFFS' FIFTH PRAYER, as asked and as granted by the court, is as follows:

"Even if the jury believe from the evidence that a lane or road had been used adversely and uninterruptedly for a period of 20 years or more over the land of the plaintiffs'

testator prior to the acts complained of which are in evidence, yet if they believe from the evidence that where those acts were committed said lane or road was only of the width of 25 feet or of lesser width, as actually so used prior to the acts complained of which are in evidence, and if they believe from the evidence that the defendant not only excavated said lane or road the full width thereof, as actually so used as aforesaid, but also excavated the soil, subsoil, and gravel of the land on either side of said lane or road so as to make the same 33 feet wide, and that the additional land so excavated had not been in adverse and uninterrupted use as a highway for the period of 20 years prior to the commission of said acts which are in evidence, *and had not been dedicated by plaintiffs' testator for a road*, then the jury are instructed that the excavation of such additional land was an illegal act, and the plaintiffs are entitled to recover" (Rec. p. 41 & 40).

Appellant's attorneys think that this prayer ignored the idea of a statutory highway, and so prejudiced appellant; but they are mistaken in so supposing.

In a prior chapter of this brief we have already shown that, among other things, *a road must have been used by the public for* 25 *years or more as a highway prior to May* 3, 1862, to be such a *statutory highway*, and have shown that to be used by the public *as a highway* for that period is to be used by the public *adversely, uninterruptedly, and under a claim of right*, and have shown that such prescribed user for such prescribed period is an *essential element* of such a *statutory highway*, and have also shown that appellant has wholly failed to introduce even *prima facie* proof of any such use of Harewood road for any such period prior to May 3, 1862.

On account of appellant's want of proof—absolute dearth of proof—of this *essential element* of such a *statutory highway*, appellant was not entitled to have the question of statutory highway submitted to the jury at all in any phase or aspect of this case, and so could not be prejudiced or injured by any failure to submit that question to the jury in any shape or form. We submit, however, that if the jury find the facts

to be according to the condition of this fifth prayer, viz., that the strip of land between the lines of the road as actually used and the L. C. boundary stones had not been in *adverse and uninterrupted use as a highway* for the period of 20 years prior at any time to the commission of the trespasses complained of, they necessarily find said strip of land not to have been used as a highway, as required by the act of May 3, 1862, and consequently find adversely to this essential element of such a statutory highway.

Appellant's attorneys also speak of the planting of the L. C. boundary stones, and say they were planted without objection from testator as indicating the extent of the claim of the District, and that plaintiffs' fifth prayer limited the proof of dedication to the plaintiffs' testator, whereas a road of that width might have been dedicated by his *predecessors in title.*

The evidence in this case, to which we have already referred, shows that said L. C. stones were planted by the levy court (Rec., p. 25) and not by the plaintiffs' testator or any other owner of the soil, and shows that they were planted between 1866 or 1867 and 1868, whilst testator was in possession of said Vineyard tract (Rec., pp. 25, 34), and the trespasses complained of were committed in 1880 and 1881 (Rec., p. 37). We have already shown that the intention to dedicate and the act of dedication, both of which are essential to an effective dedication, must spring from the owner of the soil and not from a stranger to the title or from one who neither owns nor possesses the soil.

We submit that mere tacit or silent acquiescence on the part of testator in these L. C. stones would not evidence any intent to dedicate, and could not possibly operate as an act of dedication on testator's part without any accompanying use by the public of the strip of land or of any part thereof between those stones and the former boundaries of the road, and certainly could not so operate as to that portion of such strip which encroached upon and extended within

(Rec., p. 32)

testator's fences and inclosures, nor could mere tacit or silent acquiescence on the part of testator in these L. C. stones have any possible effect, we submit, unless such acquiescence be continued for the full period of 20 years from the planting of said L. C. stones. The uncontradicted evidence, however, shows that said L. C. stones were not acquiesced in; but, on the contrary, "that neither plaintiffs nor their testator ever recognized the right of any one to plant said stones, and that plaintiffs and their testator dug up some of said stones for whatever purposes he or they desired" (Rec., p. 25), and, besides, only some 12 or 13 years elapsed from the planting of said L. C. stones in 1867 or 1868 to the commission of the trespasses complained of in 1880.

We do not see how the evidence concerning these L. C. stones could so much as tend to prove a dedication by testator himself; but, if it could, plaintiffs' fifth prayer distinctly leaves the whole question of dedication *by said testator* to the jury.

When it comes, however, to testator's *predecessors in title*, these L. C. stones, planted by the levy court between 1866 or 1867 and 1868, when testator was, and from May 3, 1857, had been, in possession of said Vineyard tract under his deed, could not possibly tend in any conceivable way to prove a dedication *by such predecessors in title*, who had parted with said tract ten or more years before those stones were ever planted.

Moreover, there is not from one end of the record to the other a particle of proof nor a lisp of evidence of any kind so much as even tends to prove any intention to dedicate or act of dedication on the part of testator's *predecessors in title or of any of them*.

Suppose in plaintiffs' fifth prayer, immediately after the words "and had not been dedicated by plaintiffs' testator," and immediately before the words "for a road," the trial court had inserted the words "*or any of his predecessors in*

title," so as to make the text read "and had not been dedicated by plaintiffs' testator *or any of his predecessors in title* for a road," which is substantially what appellant now contends for, the instruction by such an insertion or modification *would have assumed that there was some evidence from which the jury might believe that some of testator's predecessors in title had dedicated to the public the strip of land between the levy court stones and the lines of the road as actually used*, when, as a matter of fact, there was no evidence of the sort whatsoever. It would have been a clear error, therefore, for the court to have made any such insertion or to have made any equivalent modification of plaintiffs' fifth prayer.

In just such a case it was held by the court of appeals of West Virginia that—

"A court ought not to give any instruction asked, when there is no evidence in the case tending to prove the facts, on which the instruction is based."

Hutchinson *vs.* Parkersburg, 25 W. Va., 227, 238.

We submit, therefore, that the court properly granted plaintiffs' fifth prayer, that there was no error in granting the same, ~~and that there is nothing in appellant's fifth assignment of errors.~~

PLAINTIFFS' EIGHTH PRAYER as granted by the court is as follows:

"If the jury believe from the evidence that at the time of doing the acts complained of, which are in evidence, there was a right of common and public highway in the defendant to a road of only about 25 feet or less in width over the land of the plaintiffs' testator, and that an excavation in excess of the defendant's right of highway and of about 33 feet in width was made by the defendant upon the land of plaintiffs' testator, and believe from the evidence that the defendant so exceeded its right of highway and excavated gravel on the land of the plaintiffs' testator and removed and used the same beyond the limits of said land to repair or improve

other public highways in the District of Columbia without making just compensation to the owner of the soil or having any condemnation proceedings or exercising its lawful powers according to law, then the jury are instructed that the defendant would be liable as a trespasser for so doing, and that the jury must find for the plaintiffs and assess such damages as the evidence shows would make them whole" (Rec., p. 42 ~~8~~ 41).

Appellant's attorneys speak of this prayer as submitting a question of law to the jury. It cannot possibly be pretended that appellant could legally excavate or grade beyond its width of highway without proper condemnation proceedings. We suppose appellant considers that the court ought to have explained to the jury the mode, method, and details of a legal and proper condemnation proceeding. Had there been any pretense that there ever had been any condemnation proceeding whatsoever, regular or irregular, there might be some reason for supposing that statutory provisions bearing on the question of condemnation should be explained to the jury, but in the case at bar appellant did not then and cannot now pretend that there was any evidence whatsoever of any condemnation proceedings at all, either regular or irregular. There was clear affirmative proof that there was no condemnation when the levy court stones were planted (Rec., p. 25), and also that there was no condemnation at any time (Rec., p. 22).

There was no evidence whatsoever of condemnation. Under such circumstances there was no occasion to instruct the jury as to how such condemnation proceedings should be conducted, or as to what was essential to their regularity, or as to what would be a defect or an irregularity. To expound the law to them on such matters could do no possible good when, as in this case, it appears that there had been no condemnation or attempted condemnation whatsoever, good, bad, or indifferent, regular or irregular.

We submit that plaintiffs' eighth prayer was properly

granted, that there was no error in granting the same, ~~and that there is nothing in appellant's sixth assignment of errors.~~

XII.

1ST, POWERS CONFERRED UPON THE PRINCIPAL OFFICERS OF A MUNICIPAL OR OTHER CORPORATION ARE CORPORATE FRANCHISES OR CORPORATE POWERS OF THE CORPORATION ITSELF; 2D, SUCH POWERS CONFERRED BY LEGISLATIVE AUTHORITY AS INVOLVE THE EXERCISE OF JUDGMENT AND DISCRETION CANNOT BE DELEGATED; THEY CAN ONLY BE EXERCISED BY THE CORPORATE OFFICERS OR BODY ON WHOM CONFERRED; 3D, WHERE THE THING DONE IS WITHIN THE CORPORATE POWER AND MIGHT HAVE BEEN LAWFULLY ACCOMPLISHED HAD THE CORPORATE AUTHORITIES PROCEEDED ACCORDING TO LAW, THE CORPORATION WILL BE LIABLE AS A WRONG-DOER IN AN ORDINARY ACTION AT LAW FOR ACTS OF ITS OFFICERS AND SERVANTS PROCEEDING CONTRARY TO LAW OR IN AN IRREGULAR MANNER; 4TH, EVEN WHERE A RIGHT OF HIGHWAY, WITH POWER TO GRADE OR IMPROVE THE SAME, EXISTS, THE PUBLIC AUTHORITIES CANNOT LAWFULLY, WITHOUT EXERCISING SUCH POWER TO GRADE OR IMPROVE THAT HIGHWAY, OBTAIN GRAVEL OR SOIL THEREFROM TO REPAIR OR IMPROVE SOME OTHER AND DISTANT HIGHWAY, IF THE GRAVEL SO OBTAINED OR USED WAS NOT AN INCIDENT TO THE LAWFUL EXERCISE OF SUCH POWER TO GRADE OR IMPROVE THE HIGHWAY FROM WHICH IT WAS OBTAINED.

Let us examine the law upon these propositions separately, and then the facts and circumstances bearing upon them in the case at bar.

1st. On the first proposition, Selden, J., in delivering the opinion of the court in West *vs.* Trustees of the Village of Brookport, says:

"In all charters creating corporations, powers conferred upon those who stand in place of and represent the corporate body are deemed to be conferred upon the CORPORATION *itself*. The cases which prove this are innumerable, and I shall assume it without further argument" (16 N. Y., 170, *note*).

This proposition is so well settled that, like Mr. Justice Selden, we deem it unnecessary to cite further authority in support of it.

2d. We therefore come to the second proposition, and invite your attention to the following authorities in support thereof:

"The general legislative power residing in the State government may delegate to a municipal corporation some portion of its own powers, which are held in subordination to the general power.

"But *these delegated powers* given for local objects are regarded as trusts confided to the hands in which they are placed, and *are not subject to be delegated* by the repositories of them.

"The rule is plain, then, that the legislative powers of a municipal corporation *cannot be vicariously exercised.*"

15 Am. & Eng. Ency. of Law, p. 1043.

This principle applies to all powers which require the exercise of judgment and discretion. The corporate officers upon whom such powers are conferred *cannot delegate them.*

The charter of St. Louis empowered the city council to construct sewers and to prescribe their *dimensions* and *materials.*

In a case involving this charter provision the court say:

"The ordinance authorizing the construction of the sewer provides that 'said sewer shall be of such *dimensions* and of such *materials* as may be deemed requisite by the *city engineer.*' The *council* took no action as to the *dimensions* of the sewer, but left the whole matter to the discretion of the *engineer.* The power was vested in the council for some pur-

pose, we must suppose, and *they had no power to delegate it.* The council act under a sense of official responsibility, and are chosen on account of their fitness for the trust reposed in them, and their constituents have a right to require them to come up to the full measure of their duties. The law requires them to act not only in view of their direct responsibility to those who elected them, but also that they should exercise their *united wisdom* for the general good of the public. They *cannot delegate* a duty plainly and expressly devolved upon them to the mere discretion, and perhaps caprice, of a *single individual.* The rule is well settled that corporations are the mere creatures of the law, established for special purposes, and deriving all their powers from the acts creating them. The corporate acts must be done by *such officers or agents* and in *such manner* as the charter directs."

St. Louis *vs.* Clemens, 43 Mo., 403, 404.

In another Missouri case, where the city charter provided as to *repaving* of streets that "the *city council* shall cause such *repaving* to be done *in manner prescribed* by ordinance, and a city ordinance authorized the *mayor* within certain designated limits to cause the carriage-ways of streets to be *repaved*, &c., wherever and whenever *he shall deem it necessary*," the court cite a New York case, as follows, saying:

"In Thompson *vs.* Schermerhorn (2 Seld., 92) the act of the legislature 'relative to the city of Schenectady' authorized that city to make 'by-laws and ordinances ordering and directing any of the streets to be pitched, leveled, paved, flagged, &c., or for the altering or repairing the same within such times and such manner as *they* may prescribe under the superintendent.'

The common council passed an ordinance by which they directed State street, between certain points, to be 'pitched, leveled, and flagged, in such *manner* as the *city superintendent* under the direction of the *committee on roads* of the common council should direct and require.' Here, it will be observed that, instead of the *city council* prescribing the time and *manner*, they authorized the work to be done by the *city superintendent*, under the direction and requirement of the *committee on roads* of the common council, just as in

this case it was ordered to be done by direction of the *mayor*.

"Yet the court of appeals held that the ordinance was *void* because it did not prescribe the *manner* in which the street and sidewalks were to be pitched, leveled, paved and flagged; that the common council were required by statute to determine, *themselves*, the *manner* in which the improvement should be made, and *could not delegate* that power to any *officer* or *committee* of the corporation.

"The books are full of cases supporting this view, but it is unnecessary to encumber this opinion with numerous citations of authorities. The power of ordering the streets to be repaved could be exercised *only* by passing an ordinance when the *city council* deemed it necessary, &c."

Ruggles *vs.* Collier, 43 Mo., 376, 377.

S. P., *In re* The Trustee of Presbytery of New York, 57 How. Pr. R., 502.

In a suit to restrain the superintendent of streets from grading a sidewalk the court say:

"The council directed * * * in all cases that the superintendent of streets should 'cause the work to be done,' thus *delegating* the precise authority conferred upon it. The charter conferred the power upon the *council* to cause it to be done by contract or otherwise. This requires the exercise of *discretion* and *judgment* as to the *manner* in which the work should be done. Whose judgment is to be exercised? The legislature has said that it is the judgment of the *council*, but the latter has attempted to invest the *superintendent of streets* with its exercise. *This they had no power to do.*"

Birdsall *vs.* Clark, 73 N. Y. (28 Sickels), 76.

"The rule is well settled that *discretionary powers*, which are granted to one person or body, *cannot*, by that person or body, without leave, be delegated to another."

State *vs.* Fiske, 9 R. I., 96.

See also Lyon *vs.* Jerome, 26 Wendell (N. Y.), 498.

In a Kentucky case the *general council* of Louisville were empowered by the city charter to direct and authorize side-

walks in said city to be *graded* and *paved*, &c., at the cost of the owners of property binding thereon. The general council passed an ordinance that certain designated sidewalks "or such portions of said sidewalks *as the city engineer may direct* be *graded* and *paved* at the costs of the owners of property binding thereon; said work to be done subject to the *supervision* and *control* of the CITY ENGINEER, and in accordance with specifications to be furnished by *him*," &c.

The court say:

(P. 467:) "The two branches of the city council alone can determine the *necessity* of the improvement, as well as its *kind* and *character*, &c. Nowhere in the original charter or the amendments is there any authority to *refer* to any *other body* or *person* the determination of these things; because, &c., *this power* to pass ordinances for improving streets, &c., *is legislative, and cannot be delegated.* * * *

"Nothing but the most explicit language can justify a court in holding that the legislature intended to confer such vast power over the citizens' property upon the mere *discretion* of any *single officer* (p. 468), much less a simple ministerial one. * * * The *amount* of the improvement, as well as its *kind* and *character*, must be ascertained *before it is done* (p. 468). * * * To ordain, generally, that a street or square should be graded and paved, or so much thereof *as the engineer might direct* and according to specifications to be furnished by *him*, is simply to *delegate* to him *the power to fix the grade*, determine what materials should be used for the pavement, and *how much* of the street or square should be thus improved, and is *not the determination of the council* as to any of these things, but rather a general and unlimited letter of attorney to the *engineer* to have so much of a square or street *as he may deem proper* improved in a manner to *his own* liking. To allow such an ordinance to bind the property-holder is to destroy all the safeguards thrown around him by law. * * * (P. 470:) The *council* must *determine the portion* of the street or square, *the grade* and kind of pavements, and *not* authorize the *engineer* to ascertain and carry out these things *without the approval of the council by ordinance.* * * * Power is ever aggressive, and, under one specious pretext and another, perpetually struggling to strengthen its posi-

tion and enlarge its sphere, and succeeds, to a greater or lesser degree, even when surrounded by the most watchful and jealous vigilance; but when not so surrounded its strides become fearful and detrimental to the rights and interest of the citizen."

Hydes *vs.* Joyes, 4 Bush (Ky.), 467, 468, 469, 470, 471.

3d. We will now consider the third proposition.

The city of Providence owning by purchase certain lots on both sides of a private way, the *highway commissioners* of the city *excavated gravel* from the lots *and the way* until the latter became *impassable.* The gravel was used for highway repairs *at various and remote points.* All the *expenses* were paid for from the *city treasury* and from regular appropriations.

In an action of trespass on the case brought against the city by another owner of land on said private way for injury to his easement or right of way therein it was held that the highway commissioners were the agents of the city, and that the city was liable for their tort in making the way impassable, the appellate court, on May 29, 1880, saying:

"The plaintiff is entitled to an easement as one of the abutting owners. As such he can maintain his action against the city if the city is responsible for the excavations in the street. The question is, whether the city is responsible for them or only the highway commissioners; or, in other words, whether the highway commissioners in making them should be taken to have acted for the city and as its agents or simply on their own responsibility. * * *

"As owner of abutting lots, the city is *prima facie* the owner of the soil of the street to its center, and where it owns on both sides, it is *prima facie* the owner of the soil of the street throughout its entire width. *As owner of the soil of the street,* it had the right to take the soil and carry it away for use elsewhere, provided it did not thereby impair or obstruct the right of passage over it belonging to the plaintiff and the other abutters. But here the commissioners went *beyond* any right which the city had, rendering the street impassable, though they did it to get gravel for the city.

Is the city liable for the excess or transgression of right thus committed in its behalf? * * * On the whole, *we have come to the conclusion that the city is liable.* We think *the commissioners,* though they invaded the right of the plaintiff, did so, not only *for the benefit of the city,* but also *in the general course of their employment,* acting, so far as it appears, *in good faith.* They may be regarded, therefore, as the agents of the city, EVEN IN THE EXCESS WHICH THEY COMMITTED."

Sprague *vs.* Tripp, 13 R. I., 39.

The charter of St. Louis empowered that city to acquire and open streets by condemnation proceedings and payment of just compensation to the owner of the soil as therein prescribed. The city having opened a street through plaintiff's land without having any condemnation or making any compensation, the plaintiff sued the city of St. Louis, and the city was held liable, the appellate court saying:

"The whole burden is devolved on the city of taking the initiative to procure the condemnation, and no provision is made by which the value can be secured by voluntary action of the owners of the property. * * * Where no such remedy is given at the election of the party complaining of the injury *the common law right of action remains unaltered.* In this case the city proceeded to take and appropriate the plaintiff's property *without pursuing the mode prescribed in its charter* authorizing it to enter upon and use for its own purposes the land of another whenever it should be considered necessary or expedient for the furtherance of the public interests. The act done, then, *was without authority of law;* it was *wrongful* and *amounted to a trespass.* * * * If the city authorized the property to be taken, *or if, after it was so taken and appropriated to public purposes by its agents or officers, their acts were ratified and confirmed, we do not see on what principle an exemption can be claimed from making reasonable compensation.* To say that no liability was incurred because the taking was *wrongful and not in conformity with law,* and yet *to continue to use and retain the property as a public street,* and, when payment is demanded, reply that the fee to the premises is still in the plaintiff, as the original appropriation was *tortious* and therefore *no obligation arises*—seems to be arguing in a circle, and *is equivalent to a total denial of justice.*

"A corporation is civilly responsible *for damages occasioned by an act, as a trespass or tort*, done at its command, by its agents, in relation to a matter *within the scope of the purpose for which it was incorporated.* Accordingly, it has been held that a municipal corporation will be liable, where acts are done by its authority which would warrant a like action against an individual * * * or where, after the act has been done, it has been *ratified* by the corporation. * * * The city, in proceeding to take and appropriate the property to public use, was attempting to exercise the right of *eminent domain;* but here the law most carefully and scrupulously protects individual property, and the language is that private property shall not be taken for public use without just compensation."

Soulard *vs.* City of St. Louis, 36 Mo., 552, 553.

The supreme court of Indiana in 1882 say:

"Where servants of a municipal corporation, while engaged in the service of the corporation and in the performance of some work which the corporation has power to construct, *commit a trespass upon land adjoining the line of the work, the municipality is liable.* The general rule is, that a municipal corporation is not responsible for *consequential* injuries resulting from the *careful* and *skillful* improvement of a street; *but this rule does not protect it in cases where its servants wrongfully enter upon and injure adjacent land.*"

Platter *vs.* The City of Seymour, 86 Ind., 325.

In Massachusetts a case was brought against the city of Boston for obstruction to plaintiff's ingress and egress by officers of the city having authority over the streets and highways of the city by acts which they professed to do by virtue of their offices and for the use and benefit of the city. It was held that such an action of tort might be maintained against the municipality, the court, Shaw, C. J., saying:

"There is a large class of cases in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done, whether it is lawful or not. The event of a legal inquiry in a court of justice may show that it was unlawful. Still, if

it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote of the city government or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, *and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage*, reason and justice obviously require *that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual, in consequence of the acts thus done.* That an action sounding in *tort* will lie against a corporation, though formerly doubted, seems now too well settled to be questioned. * * * And there seems no sufficient ground for a distinction in this respect, between cities and towns and other corporations. Whether a particular act, operating injuriously to an individual, was authorized by the city, by any previous delegation of power, general or special, *or by any subsequent adoption and ratification of particular acts*, is a question of fact, to be left to a jury, to be decided by all the evidence in the case."

Thayer *vs.* City of Boston, 19 Pick., 515, 516.
S. P., Gordon *vs.* Taunton, 126 Mass., 352.

In another case, a town having voted that the selectmen be its agents to repair a bridge, which had been injured by a freshet, the selectmen employed agents and servants to repair the abutments and piers of a bridge, and such servants entered plaintiff's close, without his consent, and took away and used stone from it to repair the bridge, and in consequence of the removal of the stone the river washed away part of plaintiff's land, and the rest of it was exposed to similar injury from the river. The owner sued the town in tort for forcibly entering his close and committing these acts. *Held*, that the town was liable in tort to the owner of the close. Chapman, C. J., in delivering the opinion of the court, says :

" It is manifest that the acts of the selectmen were tortious; and if they were done by authority of the town an action of tort will lie against the town. When officers of a town, acting as its agents, *do a tortious act with an honest view*

to obtain for the public some lawful benefit or advantage, reason and justice require that the town in its corporate capacity should be liable to make good the damage sustained by an individual in consequence of the acts thus done. The contrary doctrine would be injurious to the person damaged and to the agents employed by the town. It would also be injurious to the town, by paralyzing the energies of such agents or officers, as they would be likely to refuse to act when prompt action is important (citing authorities). * * * It was as the agents of the town, that the selectmen took the plaintiff's property and did the injuries alleged; and by the authorities cited above, this action lies."

Hawks *vs.* Town of Charlemont, 107 Mass., 417, 418.
S. P., Hildreth *vs.* City of Lowell, 11 Gray, 349, 359.

The city of Kansas was authorized by its charter to purchase property beyond its limits for a pest-house. Smallpox prevailing in said city, which had no pest-house, the patients were sent out in charge of the city police and city physician and placed in tents by the roadside * * * east of the city. The neighbors there compelled the removal of the camp by violence, and the *physician and police* finally took possession of plaintiff's premises, where they remained from June until the last of August, under the control of officers constituting the city board of health. *The expenses of this camp were paid by the city.* In an action of tort by plaintiff against the city of Kansas for this trespass upon plaintiff's land it is *held*, "The city of Kansas is liable in damages for the trespass."

Dooley *vs.* The City of Kansas, 444 to 447.

Where plaintiff sued the city of Decatur in trespass for injuries to plaintiff's close caused by opening a street over it without condemnation or just compensation to plaintiff, the supreme court of Illinois, in sustaining the action, say:

"The law is now so well settled, that it is nowhere controverted that such corporation may be sued, in case, for tortious acts done under the instructions of such corporations. Where a corporation opens a street or a sewer, in such way

as to injure my property, it becomes a tort feasor, and as such, shall respond to me in damages. But it is denied that, if the act of the corporation does a direct, instead of a consequential injury, it is liable for the wrong. We confess ourselves unable to appreciate any reason for this distinction, and we have been referred to no authority in support of it. The act complained of in this case was the opening of a street across the plaintiff's land. The injury was direct, and the party must seek his remedy in trespass only, either against the corporation or against its servants, or the officers of the corporation who ordered the act to be done, in their individual capacity. It was once held, that a corporation could not commit a wrong, and if a wrong was committed by the officers of a corporation, in the exercise of corporate functions, it was the act of individuals and not of the corporation, because the charter of the corporation did not authorize it to committ a wrong, and hence it could not be guilty of one; but this doctrine has been long since exploded, and municipal corporations have long since been held even liable to indictment for malfeasance as well as nonfeasance, as a nuisance. If a corporation is liable for one form of tort, there is no reason why it should not be liable for a tort of another kind, simply because, by the technical forms of law, the action which must be brought to recover the damages is called by a different name. It is now the admitted law, that trespass may be maintained against a private corporation, as a railroad, and the like.

"Then why not against municipal corporations? If the answer be, that they are established for governmental purposes alone, and exercise a part of the sovereign power of the State, and are instituted only for the public good, and hence they must be protected by the immunities which are thrown around larger governmental corporations, as the State itself, we see at once that the reasoning would protect them as well from incidental injuries, resulting from wrongful acts, as from direct injuries, and that they should not be sued either in trespass or case. We perceive no reason which should exempt them from one form of action, which should not equally protect them from the other. But even States and empires are held responsible for the wrongful acts committed by their governments, or by their authorized officers, in the names of their governments. They may not, it is true, be sued in courts of justice for the injuries which they

commit, because of their sovereignty, but their responsibility is none the less acknowledged, and it is enforced, too, by other nations—their peers, who, or whose subjects, have sustained the injury. Governmental corporations then, from the highest to the lowest, can commit wrongful acts through their authorized agents, for which they are responsible; and the only question is, how that responsibility shall be enforced. The obvious answer is, in courts of justice, where, by the law, they can be sued. This corporation, it must be admitted, is subject to be sued, to enforce its liabilities, and it is reduced to the simple question, whether it can only be sued in particular forms of action, or rather, whether it is exempted from this particular form of action, for its liability in all other forms is not denied. We can see no reason or propriety in making this particular exception. If it had committed a lesser tort, so that the injury was indirect and consequential, it would be liable, in an action on the case, and we will not say that it is not liable for a greater wrong, producing a direct injury, for which, by the mere forms of proceeding, the party is required to seek his remedy in an action of trespass. There is no reason and no propriety in such a distinction, and the wisdom of the law cannot recognize it."

Allen *vs.* City of Decatur, 23 Ill., 274, 275.

In a Michigan case the plaintiff sued the village of Kalamazoo for entering plaintiff's close and throwing down his fences, &c. The acts were done on a claim that he was occupying part of a village street.

The supreme court of Missouri *held:*

"1st. A municipal corporation is liable to an action for invasion of private property, unlawfully and forcibly taken far a way by its corporate officers.

"2d. Whether a highway lawfully exists over private property is a question which cannot be settled against the owner without a trial in due course of law; and a municipal board cannot decide upon it so as to bind him, and acts at its peril in attempting it—an interested party cannot be a judge in his own case.

"3d. A municipal corporation cannot properly make a forcible entry upon premises in private occupancy under

pretence of encroachment on a highway, but it should resort to legal proceedings before it can disturb a continued possession under claim of right."

In its opinion the court says:

"The injurious act complained of is not a public grievance, but is a wrong done to a private person. It is not a wrong arising from neglect, but is the direct operation of a willful trespass. * * * As the whole control over the subject of streets, in the village of Kalamazoo, is in the corporate authorities, there is no room for the consideration of those difficulties which arise where corporate action is aimed at matters entirely foreign to the concerns of the municipality.

"The doctrine is entirely untenable that there can be no municipal liability for unlawful acts done by municipal authorities to the prejudice of private parties. In this respect, public corporations are as distinctly legal persons as private corporations. * * * When the act done is in law a corporate act, there is no ground upon reason or authority for holding that if there is any legal liability at all arising out of it, the corporation may not be answerable. There is no conflict whatever in the authorities on this head. * * * To hold that positive wrongs must in all cases be considered as purely individual and not corporate acts, would be a novelty in jurisprudence. Although not subject like corporations to the jurisdiction of courts, it has always been understood that even states and nations may be held responsible for the wrongs of their authorized agents, and the whole system of public law rests on this assumption. The idea, therefore, that a corporate body has a discretionary power to do wrong and not suffer for it, is not in harmony with any safe principle. * * * There can be no absolute discretionary power over private persons or property. They are assured by the law of the land against any improper interference, and no public authority exists which can authorize their immunity to be taken away. *The act complained of here is a forcible taking of private lands for public use, without either compensation, or any steps under the forms of law to determine the necessity of taking them.* The only justification of the act must be found in showing them to belong already to a law-

fully existing public highway. This is a question of fact and of private right, and the claimant of the land cannot be deprived, by any power in this State, from having his rights passed upon by the legal tribunals. * * * There is no case where the actual taking of private property is *damnum absque injuria. Compensation is a constitutional condition of such taking, and it can only be lawful when the necessity of the taking as well as the measure of compensation, has been determined in a legal way.* If a municipal board can finally determine that a highway already exists over private lands, there can be no security whatever against unlawful seizures. It would not only allow interested judges to decide, but it would cut off all appeal from their decisions. In all the proceedings for taking land for streets, in cities and villages, the municipality is regarded as a party litigant. * * * There would be no more propriety in allowing a corporation to determine for itself that it already owned the way, than in permitting a private person to decide his own action of ejectment. *If the property in dispute is not subject to the public easement asserted, then the village of Kalamazoo has taken possession of property it could not lawfully appropriate without a legal condemnation.* There is no authority that we can find which holds such an invasion of private lands not to be an act of the corporation, and none which would exempt the corporation from liability to an action for the wrong."

Sheldon *vs.* The Village of Kalamazoo, 24 Mich., 385 to 387.

S. P., Freeland *vs.* The City of Muscatine, 9 Iowa, 464.

In a Wisconsin case the charter of the city of Janesville declares that its common council shall have full control of the streets and power to establish the *grades* thereof, but *provides* that no streets shall be graded without a recommendation in writing, signed by a majority of the resident owners of property situate thereon. *Held*, that the city was liable to a lot-owner for injury to the lot *from the grading of a street without such a recommendation.* The court in its opinion say :

"Assuming that the common council of the city of Janesville had power under the charter to change the grade already established, we think the city was liable to the plaintiff

for all damages sustained by reason of grading the street according to the altered grade. For, while the charter enacts that the common council shall have full control over the streets of the city, and establish the grades thereof (§ 1, ch. 6 of the charter, P. & L. Laws of 1866, ch. 474), yet it clearly provides that *no street shall be graded without a recommendation in writing, signed by a majority of the resident owners of property situated on the street which it is proposed to grade* (§ 18, same chapter). Now, it is not claimed or pretended that a majority of the resident owners of property on Franklin street recommended in writing that the grade established in 1866 be made; and *for want of this necessary petition the common council had no authority to execute the work.* This *recommendation* was absolutely essential and necessary *to authorize* the common council to make the grade according to the changed grade. * * * But the common council seem to have proceeded upon the assumption that they had full authority to act under § 18 above referred to, and that it was not necessary, after the grade was changed, that a recommendation should be presented asking that the street be graded according to the grade adopted.

"That this was an erroneous view of the requirements of the charter seems to us very plain.

"And for the purposes of this case it may be conceded that under the charter the common council has absolute power to establish the grade of a street or change the grade once established, and that the property-owners have no voice in the matter; but the charter very clearly imposes this restriction upon the power of the common council that no street shall be graded without a recommendation in writing signed by a majority of the resident owners of property on the street. * * * The validity of the acts of the city officials depends in the present case upon their having proceeded in conformity to the charter; and if they have caused Franklin street to be graded in *disregard* of the conditions upon which they were *to exercise the power* of grading streets, *the city is liable for damages resulting from the illegal proceedings;* and as the common council, therefore, *had no authority* to execute the altered grade *without the proper recommendation* asking that the street be graded according to the alteration, *their action in the premises was illegal.* * * * The plaintiff was entitled to recover for all the direct and approximate damages to her property

caused by the grade in question. This point is decisive of the case."

Crossett *vs.* The City of Janesville, 28 Wis., 426, 427, 428, 429.
S. P., Dore *vs.* The City of Milwaukee, 42 Wis., 117.
Howell *vs.* The City of Buffalo, 15 N. Y., 519.

By the Laws of 1852, ch. 52, p. 46, the common council of New York cannot change or alter the grade, in whole or in part, of any street below 63d street, except upon the written consent of the owners of at least two-thirds of the land fronting upon the part of the street proposed to be altered. The common council of the city, upon application of less than two-thirds of the owners affected, passed an ordinance changing the grade of Vandewater street. In carrying the ordinance into effect they caused the street to be excavated to the depth of six feet, whereby the premises of the plaintiff fronting on it were seriously injured. *Held*, that the ordinance was void and the *corporation* was liable for the injury produced, the court saying:

"It is, therefore, quite clear that the ordinance under which the defendants acted, was not discretionary, as the defendants claim; but contrary to law, *and their acts under it unlawful*. Without the consent referred to, the defendants had no jurisdiction or right to pass it, and it being void they had no right to enter upon the street and do the act complained of, for the purpose of carrying it into effect. It is true, as claimed by the defendants, that the common council in passing the ordinance acted judicially, but their jurisdiction was special and limited, and of a nature which may always be inquired into. And where the facts do not exist to confer the jurisdiction exercised, the act is not only void but affords no protection to any one proceeding under it. In this case it is *as if no ordinance had been passed*, and the defendants stand before the court *as naked trespassers*, digging up the public highway in front of the premises of the plaintiff, and by reason of which he has sustained an injury.

"As we have seen, the act complained of was within the

corporate powers of the defendants, had they proceeded about it in a proper manner. They possess the right to change the grade of Vandewater street upon the consent of two-thirds of the owners, &c.; but what was done in this case was an *illegal exercise* of a corporate power which the defendants plainly possess, and for the damages produced by such acts, admitted to have been done under their direction, they are undoubtedly liable in an action like the present."

Mott *vs.* New York, 2 Hilton (N. Y.), 364.

Where a street was widened over petitioner's close in the city of Providence without compensation to him, the supreme court of Rhode Island say:

"When private property is taken for public use against the will of the owner, a strict compliance must be had with all the provisions of law which are made for his protection and benefit, or the proceeding will be ineffectual. The act under which Dyer street was widened prescribes a course of proceeding which, as regards the petitioner, was not pursued. * * * The commissioners, in the case of the petitioner, have not regarded these directions. * * * His property, therefore, though it has been taken from him, cannot be regarded as having been duly taken or condemned under the act, &c.

"The *City of Providence*, in dispossessing him of his property, inasmuch as it did not proceed in pursuance of the act, must be regarded as a *wrong-doer*, and we see nothing to prevent the petitioner from suing it *as a trespasser*."

Pettis *vs.* City of Providence, 11 R. I., 374, 375.
S. P., Comins *vs.* Bradbury, 447, 449.

Mr. Dillon distinguishes, as we have done, between that class of torts in which corporate liability exists and that class of torts in which such liability does not exist, saying:

"To create such a liability, it is fundamentally necessary that the act which is injurious to others must be within the scope of the corporate powers as prescribed by the charter or positive enactment; in other words, it must not be *ultra vires* in the sense that it is not within the power or authority

of the corporation to act in reference to it *under any circumstances.*"

2 Dillon on Mun. Corp., *§ 766; 4th ed., § 968, p. 1182.

And after referring to cases of that kind he says:

"Cases such as those just mentioned are to be distinguished from others which resemble them in the circumstance of relating to *wrongful acts*, but which arise out of matters or transactions *within the general powers of the corporation*, and in respect of which there may be a corporate liability.

"Thus, if in exercising its power to open or improve streets, or to make drains or sewers, *the agents or officers* of a municipal corporation, under its authority or direction, commit a trespass upon, or take possession of, private property, *without complying with the charter or statute*, the *corporation* is liable in damages therefor. In such cases, also, an action will lie against a city corporation by the owner of land through which *its agents* have unlawfully made a sewer, or for trees destroyed, and injuries done by them. * * *

"The mayor of the city tortiously and in defiance of an injunction proceeded at the head of a force of laborers and demolished a portion of plaintiff's house, for the supposed reason that it was on public ground. *The city corporation ratified the act by defending it.* * * * It was held that although the acts of the mayor were done *without the previous order of the city council*, yet the *corporation*, by reason of its subsequent *ratification*, was liable, and the plaintiff recovered."

2 Dillon on Mun. Corp., * § 769; 4th ed., § 971, pp. 1187 to 1189.

"If the corporation by its authorized action *adopts the wrongful acts* of its officers, done in the line of official duty, it will be liable therefor, however it might be in the absence of such *ratification*.

"Therefore, where the *officers* of a city illegally seized the personal property of the plaintiff and detained it, whereupon the plaintiff brought suit against the city to recover the property, *and the city filed an answer which involved a ratification of the acts of the officers in question and an admission that they were the acts of the city* and the city was defeated in the

suit, *it was held liable for the damage done to the plaintiff by the illegal seizure and detention of his property.*"

2 Dillon on Mun. Corp., * § 770; 4th ed., § 972, p. 1190.

Mr. Elliott says:

"Where it is necessary to establish a grade before making improvements or repairs and the corporate officers proceed with the work *without establishing the grade*, the *corporation* will be responsible for *resulting injuries*. Highway officers have no right to invade *private* property, negligently or intentionally, while prosecuting a public improvement. If they wrongfully enter upon such property, or if they wrongfully or negligently throw upon it soil or gravel, *the municipality* which they represent *must respond in damages to the property-owner injured*. An *entry* on private property, the deposit of materials upon it, or the negligent casting of soil or gravel upon it, is something more than mere consequential damages resulting from the improvement. * * * The fact that the improvement cannot be made without trespassing upon private property will not relieve the municipality from liability. Where there is *an entry upon private property*, either by depositing soil upon it, or by entering upon it for the purpose of doing work, private rights are involved *and an action will lie*. * * * The right to use an entire way from side to side and from end to end is the extent of the authority of the highway officers, and when they, by a direct act, or an indirect act, *wrongfully* performed, enter upon *private* property they become trespassers, and either they *or the municipality they represent will be liable in damages* (citing Broadwell *vs.* The City of Kansas, 75 Mo., 216 to 218; Hendershott *vs.* The City of Ottumwa, 46 Iowa, 659, 660; Platter *vs.* The City of Seymour, 86 Ind., 325; Mayo *vs.* City of Springfield, 136 Mass., 12 to 14). If the municipal officers do not exercise the delegated power in a lawful mode their acts cannot be justified or supported, *and their principal becomes liable for all injuries proximately resulting from their wrongful acts*. * * * It is necessary that the municipal officers should proceed in substantial accord with the law, for, as their authority comes from the law alone, they may, under the ancient and well-established rule, be regarded as trespassers from the beginning, if they depart from the law

in any material particular. It is the law alone which clothes them with authority, and if they abuse that authority in a substantial particular, they become trespassers *and for their trespasses their superior must respond in damages.*"

Elliott on Roads, pp. 347, 348, 349.

And the same author says:

"It is important to bear in mind the distinction between acts that are *entirely beyond the scope* of the municipal authority and acts, which although wrongful and illegal, are *not beyond the scope* of the corporate authority. There is, undoubtedly, a distinction between the two classes of cases. * * * It is not necessary that it should appear that the particular wrong was authorized, for it is only where the act is, in the strict sense of the term, *ultra vires* that the municipality can escape the consequences of the culpable negligence of its officers and agents. * * * So, where there is authority to construct highways, and the officers in constructing or improving the authorized highways commit a trespass, the public corporation must respond in damages (citing Ashley *vs.* Port Huron, 35 Mich., 301, and other cases, *supra*). At the expense of something like repetition, we say that the question in each case is, not whether the municipality had authority to order the particular improvement, but whether the improvement is one *of a class or kind* over which the general authority extends (citing Stanley *vs.* The City of Davenport, 54 Iowa, 469). * * * While it is true that a municipal corporation is not ordinarily responsible for the unauthorized act of a subordinate officer or agent, it is, nevertheless, true that it may make itself liable for the consequences of such an act by a subsequent *ratification.*"

Elliott on Roads, pp. 356, 357.

In a Michigan case the city of Port Huron was held liable for injury to plaintiff's house, resulting from the cutting of a sewer in such a manner as to throw water upon his premises. The court reviews numerous authorities and then says:

"It is very manifest from this reference to authorities that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is

a direct injury accomplished by a corporate act which is in the nature of a *trespass* upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. *If the corporation send people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for a tort;* but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong, than the other. Each is a *trespass*, and in each instance the city exceeds its lawful jurisdiction. A municipal charter never gives and never could give *authority to appropriate the freehold of a citizen without compensation*, whether it be done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other."

Ashley *vs.* The City of Port Huron, 35 Mich., 301.

In an action against a city to recover for personal injuries caused by the frightening of plaintiff's horse by a steam motor used upon a street railway by permission of the city council, it was held that in the absence of express statutory authority a city had no power to authorize or permit the use of steam motors upon its streets, either upon ordinary railroads or street railways, and the grant of such authority or permission constitutes negligence which will render the city liable for damages caused thereby, the court in its opinion saying:

"The remaining question is whether the city had the authority, in the absence of a grant from the General Assembly, to authorize or permit the use of the steam motor on Brady street in said city. If such power did not exist, the permission given could well be styled negligence, for which the city should be held responsible. Unless the city can shield itself by reason of its authority in the premises, the permission to use the motor on the street constitutes negligence. * * * The charter empowers the defendant to 'open,

alter, abolish, widen, extend, establish, grade, pave, or otherwise improve and keep in repair, streets, avenues, and alleys.' That the requisite power is not contained in the charter we regard as beyond serious controversy. * * * The city does not have the authority to * * * authorize the streets to be used for private purposes. Nor can it without legislative authority grant the use of a street for a public purpose, which renders it dangerous for the public to travel over it in any other manner.

"Streets and highways are under the exclusive control of the General Assembly. It matters not if the fee of the streets is in the city, it has no authority to control or grant rights and privileges thereto or thereon, unless it has been so authorized. The power and authority of the city is contained in its charter and bounded thereby. It has no other or different control of the streets than is prescribed in the charter or the general statutes of the State. * * *

"It is suggested, &c., that, the act of the city council being without authority, the city is not responsible for any consequences resulting therefrom. The city had jurisdiction of the subject-matter, that is, of the streets, and could act in relation thereto through its council. *The latter had control of the streets of the city*, but were mistaken as to the *extent of their authority*. The *particular thing* the council authorized to be done was *illegal*, and we think the city is responsible for the consequences resulting therefrom."

Stanley *vs.* The City of Davenport, 54 Iowa, 467 to 469.

In a Mississippi case the court say:

"Although the finding is general, it may be assumed to have been upon the distinct ground that the corporation was not liable for the unauthorized trespass of the street commissioners. And here the exact character of this case may be more distinctly stated than heretofore, with advantage:

"1. The street commissioners were ordered to examine the condition of the streets, let contracts and report.

"2. Although *not so ordered* they proceeded to work the streets.

"3. In repairing the streets they committed the trespass complained of; this was not in the line of their duty. It was without authority or direction of the mayor and alder-

men. Knowledge of the trespass on the part of the mayor and aldermen is not shown. *The street commissioners, without orders or authority, deliberately and of their own volition, went outside their line of duty, entered, without the consent of the owners, upon a lot, from which they hauled soil for the repair of the streets.*

"4. When called upon, the mayor and aldermen *repudiated* the trespass, and an investigation and report were directed.

"5. *Whether the repairs were adopted by the city authorities, and the acts of the street commissioners thus ratified, does not appear.* They have probably done so, but this cannot be presumed. Upon the case presented, by the record, the judgment of the court below is clearly right" (pp. 190, 191).

But in the course of its opinion in this case the court use the following pertinent and significant language, viz:

"IF THE CITY HAD THE BENEFIT OF THE SOIL FROM PLAINTIFF'S LOT, AND DID NOT RETURN IT, AS PROBABLY IT COULD NOT, AND CONTINUED TO USE IT AND EXERCISE AUTHORITY AND CONTROL OVER IT, THIS WOULD PROBABLY BE A RATIFICATION."

Sherman *vs.* City of Grenada, 51 Miss., 190.

In McGary's case the president of the council tortiously and in defiance of an injunction proceeded at the head of a gang of laborers and demolished a portion of plaintiff's house, *for the supposed reason that it was on public ground,* though in fact it was not. The act complained of was not in any way either authorized or ratified till the defendants filed their answer, which "contains a general denial *and avers that they have done nothing and do not intend to do anything except what may be authorized by law and by the judgment for the construction and preservation of the levee in front of the city.*"

The city having thus—and thus only—ratified the act complained of by so defending it, the supreme court of Louisiana on the first appeal doubted as to the liability of the

corporation for the tortious acts charged against its officers; but on the second appeal that court said:

"We have no hesitation in saying that those facts authorize the recovery of damages against the defendants. It is true, the acts complained of were not done by the authority and order of the city government, but those acts, after they were done, were *ratified* by the corporation."

McGary *vs.* The City of Lafayette, 12 Robinson (La.), 670, 673, 678; S. C., second appeal, 4 La. Ann., 440.

In this case, as mentioned above, the only ratification by the *corporation* was that contained in its answer, *supra;* and in another and a later case that same court said:

"It seems that the present plaintiff brought a former suit against the city for the recovery of a horse and dray; *to that suit, the city filed an answer which involved a ratification of the acts of the officers in question, and an admission that they were the acts of the city.* The city was cast in that suit. *This brings the case within the rule laid down in McGary vs. Lafayette* (4 La. Ann., 440)."

Wilde *vs.* City of New Orleans, 12 La. Ann., 15.

4th. We come now to the fourth proposition, and in support of it we refer you to the following authorities:

Plaintiff owned lots bounded by Wilson and Frank streets, in a city. The common council agreed with a contractor for making a fill of earth upon Washington street, in said city, not contiguous to said lots, and ordered and permitted the contractor to remove earth from part of one of said streets along the line of said lots to make such fill. Such earth was not required or used for the improvement of said streets along which the lots were located, and the removal thereof damaged said lots. No order had been made or ordinance adopted by the common council for the improvement of said streets prior to the contract or the removal of the earth. In an action by such lot-owner against the city

for the injury to his lots it was held that the city was liable. The court say:

"In the case under consideration there was no order made for making the improvement. * * * It necessarily and unavoidably results that the city cannot be protected from liability on the ground that it was proceeding under the charter. It was acting in violation of law. It was a trespasser, and is liable for it as such. But suppose that the common council of said city had made an order, in due form of law, for the improvement of Washington street, had advertised for proposals, and had entered into a valid and legal contract for the making of such improvement, would such things be a justification of the acts complained of? *We think not.* The common council of a city has the undoubted right to establish the grade of a street, and may cause the same to be excavated at one point and filled at another; and the earth, gravel, or stone excavated at one point may be used in making a fill at another point *in the said street.*

"But the real and substantial question in the case under consideration is this: Had the common council the power to order or direct *the cutting down of Frank street for the purpose of obtaining dirt or gravel with which to fill up Washington street?* WE THINK THEY POSSESSED NO SUCH POWER. * * * There must be a plan of improvement adopted, and when this is done, the public and the private citizen will know their rights. We think that it is quite clear that the authorities of a city have no power to order the removal of earth, gravel, or stone from a street, unless it is done in pursuance of an order *for the improvement of such street.* If the common council of Delphi had established the grades of Washington and Frank streets in said city, and had made an order for their improvement in conformity to the grades established, there can be no doubt that the earth, gravel, and stone excavated in Frank street might have been used in filling up a low place in Washington street.

"By so doing the common council would have exercised the power they possess over the streets and alleys of such city, and the excavation in Frank street would have been made as much for the improvement of that street as the fill in Washington street would have been for the improvement of the latter street."

The City of Delphi *vs.* Evans, 36 Ind., 100, 101.

In Turner *vs.* Rising Sun, &c., T. P. Co., it was decided that, although by a lawful appropriation, a public highway had become the property of the turnpike company for the purpose of maintaining and constructing its road thereon, with a statutory provision authorizing it to take from the land so occupied stone, gravel, &c., for the road's construction, yet under the law *it could not open a gravel pit in the highway and haul out the gravel generally* upon its road without compensating the land-owner therefor. It is further said that a road supervisor could not rightfully thus interfere with the rights of the owner of the fee (71 Ind., 548).

In City of Aurora *vs.* Fox it is decided: "The right to the soil of the street remains in the owner of the fee, and the municipal corporation has no right to remove it, *unless its removal be necessary for the improvement of the street.* The removal of the soil *for any other purpose* than that of improving the street is *an actionable wrong*," although "where there is *a general plan* for the gradation and improvement of highways, intersecting streets and highways *in the vicinity of the one improved* are to be deemed *parts of the same general* plan, and the soil may be removed from one and placed upon another." Again, in the same case: "It is therefore necessary that where the soil is removed from one street to another, it should be shown that the improvement of the two streets was embraced in and formed part of one and the same general plan. The city, as we have already said, had no right to remove the soil, *unless it was necessary for the improvement of the street*, nor had it any right to use the earth taken from the street for any other purpose than that of grading streets *forming part of the same general plan of improvement*" (78 Ind., 5, 6, 9).

In Anderson *vs.* Bemont the court, after citing numerous authorities, say:

"Taking all the cases together, we are of the opinion that where a road supervisor digs up gravel or earth from within the limits of a public highway, *not for its improvement at that*

point, nor for the purpose of bringing the highway *there* to the desired grade, but merely for the purpose of obtaining material for improving the highway at some place *remote from the owner's land*, THE ACT CANNOT BE REGARDED AS A PROPER EXERCISE OF THE MUNICIPAL POWER. To justify the supervisor, it is the removal which must be for the improvement of the highway, and not merely the replacing of the material at the remote point" (13 Ind. App. Ct., 252).

In Roberts *vs.* Sadler the court of appeals, after reviewing some of these cases with others from New York, * * * declared that the municipality could not remove, *for use in other places*, the gravel, &c., from within the boundaries of the highway, where this removal was not necessary to nor intended for the establishment of the proper grade *on that part of the highway* (104 N. Y., 232, 233; 10 N. E. Rep., 428).

In Ladd *vs.* French, decided in July, 1889, the action was trespass for digging and carrying away soil and gravel from a highway in the town of Fine, the fee of which plaintiff owned. The court say:

"The plaintiff is the owner of land over which a highway runs. The defendant, by direction of the commissioner of highways, dug gravel from the plaintiff's land between the traveled part of the road and the plaintiff's fence, and carried it away, and put it on other parts of the road within the road district. In our opinion the question is settled by the decision in Roberts *vs.* Sadler (104 N. Y., 232; 10 N. E. Rep., 428). *This gravel was not taken for the purpose of reducing the highway to a proper grade*, which would seem, by that opinion, to be permissible. It was taken to fill up some inequalities ELSEWHERE, or to improve the road *elsewhere*. The gravel was plaintiff's, although the public had a right of way over it; and this taking of the gravel was not incident to the rights of the public. Judgment for plaintiff affirmed. All concur" (6 N. Y. Sup., 56, 57).

The case of Cotauch *vs.* Grover, decided in 1890, follows the leading New York cases of Roberts *vs.* Sadler and Ladd *vs.* French, *supra* (57 Hun., 279).

The following cases, viz., Rich *vs.* City of Minneapolis (37 Minn., 424, decided in 1887); Viliski *vs.* City of Minneapolis (40 Minn., 307, decided in 1889) are to the same effect.

The supreme court of Georgia, in a case of this kind, say:

"This was a suit brought by the defendant in error against the city of Macon for damages arising from the digging down and removing dirt and gravel from the street in front of his house, *not for the purpose of grading that street*, but to fill up cavities *in other streets of the city* and *to improve them*.

"The jury found for the plaintiff $600. The city * * * brought the case here for our review. The first point made is, that the court erred in overruling a demurrer to plaintiffs' declaration. We rule that the court did not err in overruling the demurrer. The declaration alleged that the damage was done, not for the legitimate grading of the street, but *to fill up and improve other streets*. This allegation made a good cause of action, and on proof thereof, the plaintiff was entitled to recover; therefore it was right to overrule the demurrer and retain the case for trial."

City of Macon *vs.* Hill, 58 Ga., 596.

In an earlier case in Georgia plaintiffs' lot in the city of Rome had upon it a valuable residence site, a valuable stone quarry, and a valuable sand bank. There was also a ferry landing on said lot, which communicated with valuable land on the opposite side of the river.

The mayor and council of Rome quarried large quantities of rock from said land, removed trees therefrom, and thereby caused great injury to the lot. Plaintiff filed a bill to enjoin the city from injuring said property. The mayor and council answered that upon the application of complainant they had laid out two streets over plaintiff's land; that a high, rocky bluff projects part way across one of the streets; that defendant took rock from this bluff within the boundaries of the street, and has used the rock *for macadamizing some of the streets* of the city and building a few culverts, and

claims the right so to do; that said sand bank alluded to is in the street. The value of the property was admitted, but the damage done denied, &c. The court below refused the injunction, and the complainant appealed. The appellate court say:

"The first question therefore is, Whether the defendant has this right?

"The gift, by the complainant to the defendant, was that of the right of way over his land. It was no more than that. Is a gift of the right of way a gift of the earth, rock, trees, and other materials which may happen to exist within the boundaries of the way? Is a gift of the right of way a gift of all the gold that may exist beneath the surface of the way, the right to which is given? Lord Mansfield said 'that the King has nothing but the passage for himself and his people; but the freehold and all profits belong to the *owner* of the soil.' So do all the trees upon it and *mines* under it (which may be extremely valuable). * * * A gift, then, of the right of way is *not* a gift of the earth and other materials that may exist within the boundary lines of the way, the right of which is given.

"It follows that the defendant did not have the right to take rock from 'the rocky bluff' aforesaid, *to be applied to the macadamizing of the streets of Rome, and to the building of culverts.* The defendant, no doubt, has the right to level the bluff, so as to make the street passable the whole width of it. In the right to make the street, is implied the right to do this. The defendant having the right to make the street, has a right to do everything requisite to the making of the street. And this is the limit of the defendant's right. The fragments of rock that might result from the process of leveling the bluff, would belong, *not* to the defendant, the owner of no more than the right of way, *but to the complainant, the owner of the soil.* * * * Taking rock for the purposes of applying it to the uses aforesaid, would amount to the commission of waste. And an injunction to stay waste, has become almost a matter of course."

Smith *vs.* The City of Rome, 19 Ga., 21, 22.
S. P., Tucker *vs.* Eldred, 6 R. I., 404 to 406.

In the case of Haas *vs.* City of Evansville, decided in 1898, the court of appeals of Indiana cited Anderson *vs.* Bement, Turner *vs.* Turnpike Co., and City of Delphi *vs.* Evans, and *held:*

"An abutting property-owner on a city street has the right to *surplus* earth and gravel and other materials excavated from the street in front of his property *for the purpose of improving the street*, subject only to the right of the city to use them in improving *other streets under the same general plan of improvement.*"

Saying:

"It will be seen that in each of the above cases complaint was made because of the removal of earth from a place, *not itself being improved*, but for the purpose of getting earth to make *some other improvement*, and this fact clearly distinguishes these cases from the case at bar. The same is true of many of the cases of other courts cited by counsel. Although the fee of a street and a public highway may be in the adjoining lot-owner, and as a general proposition he retains absolute control, subject only to the public easement, yet the uses to which a street in a city may be put are greater than with respect to ordinary highways in the country. In populous cities the easement is necessarily something more than a mere right of passage. The abutting owner is still the owner of the soil, and retains his exclusive right to all mines, quarries, and the like not inconsistent with the public use, &c. * * * In this State the rule is declared to be that the city can remove the natural soil from one street to another *only when the improvement of the two streets is embraced in one and the same general plan of improvement.* (City of Aurora *vs.* Fox (*supra*) being at this point cited and quoted with approval, the court, continuing its opinion, then say:)

"There is good reason for the limitation expressed in the rule as declared in the above case. * * * Where the abutting owner surrenders such rights as the public easement requires, it may be said that he impliedly agrees to surrender his rights to the soil should the municipality need it in repairing or improving that particular way or system of which that is a part, *and which the law presumes enhances*

the value of his property. But this is carrying the rule to its limit, and it will not do to say that he impliedly agreed that his property might be taken by the municipality *to enhance the value of the property of some one else.* The city could not, as of right, take the material and use it for the purposes it did use it. So that, unless it acquired this right in some way at some stage of the proceedings, the right did not exist, and such taking was wrongful, and a right of action accrued to the injured party."

Haas *vs.* City of Evansville, 50 N. E. Rep. (Ind.), 47, 48;
6 Va. Law Register (No. 2), 116, June, 1878.
S. P., Althen *vs.* Kelly, 32 Minn., 283.

Mr. Elliott says:

"The right to the soil of a street belongs to the owner of the fee, and where, as in most cases, the municipal corporation does not own the fee it has no right to remove the earth from a street unless its removal is necessary for the improvement of *the street*, or of a street forming a part of *the same system of improvements.*"

Elliott on Roads, p. 523.

We respectfully submit that the authorities to which we have referred in this chapter of our brief fully sustain the propositions of law which are stated at the head of this chapter.

Let us now see what were the statutory provisions and the facts and circumstances as they existed at the time when the trespasses complained of were committed:

By § 2 of the act of March 3, 1871, Congress requires the proper municipal authorities of the District of Columbia within 60 days from and after the passage of this act to locate, construct, and maintain *a free public highway* on and over the turnpike road in this District leading from the boundary of the city of Washington near the end of Seventh street of said city and extending to the boundary of the District of Columbia towards Brookville, Maryland, by act of Congress of February 15, 1819, and empowers said municipal authorities to take any real estate and franchises belonging

to said turnpike company which may be necessary for the construction and maintenance of such *free public highway.*

Section 3 of said act provides for condemning and paying said turnpike company for the real estate and franchises so taken.

Act of Congress of March 3, 1871, ch. 139, § 2, 3; 16 Stat. L., 586.

It was under this statute that what is now called Seventh Street road (or Brightwood avenue) became a public road of and belonging to the District of Columbia.

The act of Congress appropriating the necessary funds for the purpose of paying half the estimated expenses of the government of the District of Columbia for the year ending June 30, 1880, merely contains the following items as to county roads:

"For streets as follows: * * * Current work of *repairs* of streets, alleys, *county roads*, and so forth, one overseer of *repairs*, $2,000; one clerk, $1,900; four *supervisors of roads*, at $900 each, $3,600; labor, cart hire, materials and miscellaneous items, $75,500."

Act of March 3, 1879, ch. 182, § 3; 20 Stat. L., 469.

The appropriation act for the succeeding year contains the following significant items:

"That the half of the following sums named, respectively, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, and the other half out of the revenues of the District of Columbia, for the purposes following, being the estimated expenses of the government of the District of Columbia for the fiscal year ending June 30, 1881, namely (p. 155):

"FOR IMPROVEMENTS AND REPAIRS.

"*For repairing and macadamizing Seventh Street road*, $1,500 (p. 156).

"GENERAL EXPENSES.

"For salaries, &c.

"For division of streets, alleys, and county-roads office: One superintendent, $2,000; one clerk, $900; three supervisors of roads, $900 each; in all, $5,600 (p. 158).

"For streets.

"For current work of *repairs* of streets, alleys, and *county roads*, including labor, cart hire, materials, inspection, and miscellaneous items, $70,000" (p. 159).

Act of June 4, 1880, ch. 121, § 1; 21 Stat. L., 155, 156, 158, 159.

And the appropriation act for the next year contains the following significant items:

"That the half of the following sums named, respectively, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, and the other half out of the revenues of the District of Columbia, for the purposes following, being the estimated expenses of the government of the District of Columbia for the fiscal year ending June 30, 1882, namely (p. 458):

"FOR IMPROVEMENTS AND REPAIRS, &C.

"*For repairs to McAdam roadways*, $5,000 (p. 458).

"GENERAL EXPENSES.

"For salaries, &c.

"For division of streets, alleys, and county-roads office: One superintendent, $2,000; one clerk, $900; three supervisors of roads, $900 each; in all, $5,600 (p. 461).

"For streets.

"Current *repairs* to county roads, $20,000" (p. 462).

Act of March 3, 1881, ch. 134, § 1; 21 Stat. L., pp. 458, 461, 462.

The act of June 11, 1878, creating our present District government, among other things, enacts as follows:

"§ 1. That all the territory which was ceded by the State of Maryland to the Congress of the United States for the permanent seat of the Government of the United States shall continue to be designated as the District of Columbia. Said District and the property and persons that may be therein shall be subject to the following provisions for the government of the same, *and also to any existing laws applicable thereto not hereby repealed or inconsistent with the provisions of this act.* The District of Columbia shall remain and continue a municipal corporation, as provided in section two of the Revised Statutes relating to said District, and the Commissioners herein provided for shall be deemed and taken as officers of such corporation; *and all laws now in force relating to the District of Columbia not inconsistent with the provisions of this act shall remain in full force and effect.*

"§ 2. That within 20 days after the approval of this act the President of the United States, by and with the advice and consent of the Senate, is hereby authorized to appoint two persons, who, with an officer of the corps of engineers of the United States Army, whose lineal rank shall be above that of captain, shall be *Commissioners* of the District of Columbia, and from and after July 1, 1878, shall exercise all the powers and authority now vested in the Commissioners of said District, except as are hereinafter limited or provided, and shall be subject to all restrictions and limitations and duties which are now imposed upon said Commissioners.

"§ 3. That as soon as the Commissioners appointed and detailed as aforesaid shall have taken and subscribed the oath or affirmation hereinafter required, all the powers, rights, and privileges lawfully exercised by, and all property, estate, and effects now vested by law in the Commissioners appointed under the provisions of the act of June 20, 1874, shall be transferred to and vested in and imposed upon said Commissioners; and the functions of the Commissioners so appointed under the act of June 20, 1874, shall cease and determine. * * * The said Commissioners shall submit to the Secretary of the Treasury for the fiscal year ending June 30, 1879, and annually thereafter, for his examination and approval, a statement showing in detail *the work proposed to be undertaken by them during the fiscal year next en-*

suing, and the estimated cost thereof; * * * and also an itemized statement and estimate of the amount necessary to defray the expenses of the government of the District of Columbia for the next fiscal year. * * * The Secretary of the Treasury shall carefully consider all estimates submitted to him as above provided, and shall approve, disapprove, or suggest such changes in the same, or any item thereof, as he may think the public interest demands; and after he shall have considered and passed upon such estimates submitted to him, he shall cause to be made a statement of the amount approved by him and the fund or purpose to which each item belongs, which statement shall be certified by him, and delivered, together with the estimates as originally submitted, to the Commissioners of the District of Columbia, who shall transmit the same to Congress.

"To the extent to which Congress shall approve of said estimates, Congress shall appropriate the amount of 50 per cent. thereof; and the remaining 50 per cent. of such approved estimates shall be levied and assessed upon the taxable property and privileges in said District other than the property of the United States and of the District of Columbia.

"§ 5. That hereafter when any *repairs* of streets, avenues, alleys or sewers within the District of Columbia are to be made, or when new pavements are to be substituted in place of those worn out, new ones laid, or new streets opened, sewers built, *or any works* the total cost of which shall exceed the sum of $1,000, notice shall be given in one newspaper in Washington and if the total cost shall exceed $5,000, then in one newspaper in each of the cities of New York, Philadelphia, and Baltimore also for one week, for proposals, with full specifications as to materials for the whole or any portion of the works proposed to be done, &c., &c. *Provided*, That work capable of being executed under a single contract shall not be subdivided so as to reduce the sum of money to be paid therefor to less than $1,000.

"All contracts for the construction, improvement, alteration, or repairs of the streets, avenues, *highways*, alleys, gutters, sewers, *and all work of like nature* shall be made and entered into only by and with the official *unanimous* consent of the Commissioners, and no contract involving an expenditure of more than $100 shall be valid *until* recorded and signed as aforesaid. * * * The United States shall

pay one-half of the cost of all work done under the provisions of this section, except, &c., which payment shall be credited as part of the 50 per cent. which the United States contributes toward the expenses of the District of Columbia for that year; and *all payments* shall be made by the Secretary of the Treasury *on the warrant or order of the Commissioners* of the District of Columbia, or a majority thereof, in such amounts and at such times as they may deem safe and proper in view of the progress of the work."

Act of June 11, 1878, ch. 180, §§ 1, 2, 3, and 5; 20 Stat. L., pp. 102 to 106.

Compiled Statutes, ch. 19, §§ 6, 7, 15, 24, 44, 47, 48, 55, and 56, pp. 102 to 106.

At the time of the commission of the trespasses complained of the following statutes were also in force in this District, viz:

"The *Commissioners* [Legislative Assembly] shall have the care and charge of and the exclusive jurisdiction over all the public roads and bridges except," &c.

R. S. D. C., ch. 11, § 247, p. 29.

Compiled Statutes, ch. 29, § 2, p. 267.

"Whenever application shall be made to the proper authorities by residents of the District without the limits of Washington and Georgetown, to lay out a new or alter any existing road, *and whenever such authorities shall deem it conducive to the public interest to open a new road, or* WIDEN *or change the course of an old one*, the route of such road shall be surveyed, and a plat or map of the same prepared."

R. S. D. C., ch. 11, § 252, p. 29.

Compiled Statutes, ch. 29, § 7, p. 267.

"The proper authorities shall cause notice to be given, by advertisement twice a week for three weeks, of the proposed *opening* of a *new* road, or of the *alteration* of an *existing* one, calling upon all persons who may have any objections thereto to present them to such authorities at their next regular meeting, when, if any objections are made, such objections shall be heard."

R. S. D. C., ch. 11, § 253, p. 29.

Compiled Statutes, ch. 29, § 8, p. 267.

"If no objection to the *opening* or *altering* a road is made by the owners of the land through which it must pass, after such notice, it shall be taken for granted that no damages are or will be claimed, and the road may be recorded and opened, and shall then be a public road or highway."

R. S. D. C., ch. 11, § 255, p. 29.
Compiled Statutes, ch. 29, § 10, p. 268.

"If any owner of land *shall object and claim damages*, and the amount cannot be agreed upon, the proper authorities shall direct the marshal of the District to summon a jury of seven judicious disinterested men, not related to any party interested, to be and appear on the premises on a day specified *to assess the damages* if any, which each owner of land through which the road is to pass may sustain by reason thereof."

R. S. D. C., ch. 11, § 257, p. 29.
Compiled Statutes, ch. 29, § 12, p. 268.

"It shall be the duty of the marshal, upon receiving the order mentioned in the preceding section, to give the owners not less than ten days' notice of the time and place of the meeting of the jury *to assess their damages*."

R. S. D. C., ch. 11, § 258, p. 30.
Compiled Statutes, ch. 29, § 13, p. 268.

"The marshal shall summon a jury and administer an oath or affirmation to them that they will, without favor or partiality to any one, to the best of their judgment, decide *what damage*, if any, each owner may sustain by reason of running the road through his premises."

R. S. D. C., ch. 11, § 260, p. 30.
Compiled Statutes, ch. 29, § 15, p. 268.

"The jury, having been upon the premises and *assessed the damages*, shall make out a written verdict, to be signed by them, or a majority of them, and attested by the marshal, which the marshal shall transmit to the proper authorities at their next meeting, and which shall be recorded."

R. S. D. C., ch. 11, § 262, p. 30.
Compiled Statutes, ch. 29, § 17, p. 268.

"In any case where materials of any kind shall be deemed necessary for making or repairing a public road, if the proper authorities cannot agree with the owner as to their purchase, such materials may be condemned in the manner as provided for in this chapter in cases of condemnation of land for the purposes of a public road."

R. S. D. C., ch. 11, § 267, p. 30.
Compiled Statutes, ch. 29, § 22, p. 269.

Plaintiffs' tenth prayer, as granted, is as follows:

"If the jury shall find from the evidence that the defendant was in want of gravel for use on the public roads, and that one of its Commissioners was applied to and directed the excavation on the land of the testator of the plaintiffs for the purpose of obtaining such gravel, and that said gravel was accordingly obtained and used, then, in the absence of evidence that such gravel was the result of the exercise of the judgment and discretion of the Commissioners of the defendant directing the grading of the highway by means of such excavation, it was unlawful to make such excavation and take the gravel without compensation.

"If the evidence shows to the satisfaction of the jury that said grading or the removal of said gravel was done under the supervision of the officers and by the employés of said defendant, it will be competent for the jury to presume from this fact that it was authorized and directed by the joint action of the Commissioners of the defendant, unless there be evidence that satisfies them that the contrary is the fact" (Rec., p. 42).

And plaintiffs' eleventh prayer, as granted, is as follows:

"The burden of proof is upon the defendant to satisfy the jury that the gravel was obtained incident to the legal exercise of the power to grade. Such power to be lawful must have been exercised by the Commissioners jointly. It could not be exercised by any one of the said Commissioners, as the power could not in law be delegated. If the gravel obtained and used was not the incident to the exercise of the power to grade, but was obtained without the lawful exercise of the power to grade, then the use of the said gravel, as well as the said excavation, was unlawful, and the defendant has not maintained its plea of justification.

"*If the evidence shows to the satisfaction of the jury that said grading or the removal of said gravel was done under the supervision of the officers and by the employés of said defendant, it will be competent for the jury to presume from this fact that it was authorized and directed by the joint action of the Commissioners of the defendant, unless there be evidence that satisfies them that the contrary is the fact*" (Rec., 42, 48).

The court added the italicized words at the end of each of these prayers.

If we assume, for the sake of the argument, that Harewood road was a public road, and that power to grade it existed, still it is very clear from the authorities cited above that such power must be exercised by those and those only upon whom it has been bestowed and in whom it exists; and in the case at bar the Commissioners, as principal officers of the corporation, would be the parties to exercise such power (if it exists at all), whether it be regarded as a power cast upon or bestowed upon the corporation itself or upon the Commissioners, as such principal officers thereof.

We have already pointed out that such a power, involving as it does the exercise of judgment and discretion, cannot be delegated. The authorities cited, *supra*, clearly and conclusively establish that the Commissioners could not delegate any such power to one of their number or to any other or inferior officer or agent of the corporation, much less could *one* of the Commissioners delegate such power to another and inferior officer or agent of the municipality.

If the power existed, it was essential that the Commissioners themselves should exercise it before any grading could lawfully be done; they must exercise their united judgment and discretion in fixing and establishing a grade and in determining how much grading shall be done and in deciding where and to what extent and in what manner the road shall be graded. They cannot leave others or subordinate or mere ministerial officers to determine these things, though after the Commissioners have themselves

properly exercised such power and decided upon and determined all such things they can direct their subordinates to do the work according to what they (the Commissioners) have determined upon. We have also shown in prior chapters of this brief that the burden of proof was on the appellant to establish its plea of justification.

In the case at bar there is no proof that the power to grade (if it existed) was ever exercised by the Commissioners according to law, or ever so much as attempted to be exercised by them at all. There is evidence tending to show that they had determined upon the macadamizing, repairing, or improving of Seventh Street road and needed gravel for carrying out and completing such work on Seventh Street road, but there is nothing to show that they had determined upon any grade or improvement of Harewood road. On the contrary, there is a good deal to show that their only purpose and object was not to grade or improve Harewood road, but solely to get gravel for a top dressing to the McAdam roadway on Seventh Street road.

We consider that the following facts and circumstances show or tend very strongly to show that such was the case:

On March 3, 1879, under the head of *improvement*, for the ensuing year the sum of $15,000 was appropriated by Congress *for macadamizing Seventh Street road*, whilst nothing was appropriated for *grading or improving* Harewood road (20 Stat. L., 409, *supra*).

On March 3, 1881, under the head of *improvements* for the ensuing year the sum of $5,000 was appropriated *for McAdam roadways*, whilst again nothing was appropriated for *grading or improving* Harewood road (21 Stat. L., 458, *supra*).

Defendant's witness, John J. Burrows, general superintendent of the Engineer Department of the District, says that—

"Witness took gravel out of Harewood road for a part of two years, 1880 and 1881, *for use on Seventh Street road*, which is a mile west of Harewood road; that the gravel taken from

Harewood road in 1880 and 1881 was used in the repair of Seventh Street road; *that in the repair of Seventh Street road gravel was required by the public authorities*, and witness was directed by Maj. Twining, then Engineer Commissioner of the District of Columbia, *to take the gravel from Harewood road* TO AN EXTENT NECESSARY FOR USE ON SEVENTH STREET ROAD, TO TAKE IT WHEN WITNESS COULD FIND IT ALONG THE ROAD, and he instructed witness to cut down the knoll or hill on Harewood road in getting said gravel AND BRING IT TO AN EASY GRADE, *and to use the gravel in making such improvements as he directed in Seventh Street road*; that in doing this work witness had no written directions." (Rec., pp. 35, 36).

On cross-examination witness testified *he was employed on Seventh Street road* AND REQUIRED GRAVEL *and reported* THAT FACT *to his superior, Twining, and received a verbal order from Twining to get it by* DIGGING DOWN *Harewood road, and complied with the order* AND DUG IT DOWN (Rec., p. 36).

This evidence, we submit, shows very clearly that the real and only purpose and object, both of witness and of Twining, was to get gravel for the work on Seventh Street road; it shows that they would never have thought of touching Harewood road except that they wanted graved on Seventh Street road.

Burrows was told "*to take it when he could find it along the road.*" This shows there was no thought of digging, or digging down, Harewood road except for gravel. He was only to dig down in case there was gravel and where there was gravel. Moreover, Burrows was not told to bring knoll or road to any determinate or established grade. In chief he said he was told to cut down the knoll in getting the gravel and bring it to *an easy grade*. Had the power to establish the grade been in Twining as contradistinguished from being in the Commissioners, he could not have so delegated such power to Burrows; he could not have left the determination of the grade to Burrows' judgment, yet this is precisely what Twining's instruction would amount to. On cross-examination he makes it even worse. He says he was

verbally ordered by Twining to get it, the gravel, by "*digging down*" and he "*dug it down.*"

This evidence shows that neither the Commissioners nor Twining established or attempted to establish any grade for Harewood road; it shows that what was done was left wholly and exclusively to the judgment and discretion of Burrows as to where he should dig, how he should dig, and how far he should dig; it shows only too plainly that the only purpose was to get gravel for Seventh Street road.

The record states when testator communicated with the Commissioners, Dent and Twining, first Dent and afterwards Twining, stating his objections and protesting against the trespass and informing them of his ownership of and title to Harewood road within his land, of his deeds for the same, of there never having been any condemnation thereof by, or grant or gift thereof to, the public or to the District, and of testator's rights in the premises, that Commissioner Dent (president of the Board of Commissioners) mentioned that he had previously heard that acts had been done, and that testator had objected, and "*that he had given orders that no damage should be done to testator*" (Rec., p. 24).

This, we submit, indicates that no grade had been established, and that no purpose existed so far as Dent was concerned to do anything of the kind or to cause any such injury.

Commissioner Twining, upon being seen as aforesaid, stated that "*he wanted to macadamize the Seventh Street road* as far as the District line, and was then at work upon the same, and *that gravel which they found in Harewood road through testator's said land was a particularly fine gravel* and that he used it as a top dressing on said Seventh Street road" (Rec., p. 24); and when it was stated to said Twining that these facts did not justify what was being done, and he was requested to stop the digging and hauling away of gravel from testator's said land, he finally said "*he would see if he*

could find any gravel elsewhere that would answer his purpose, and if he could would let said testator know" (Rec., pp. 24, 25).

This again shows that the real purpose was to get gravel, and that the getting of suitable gravel for a top dressing on the macadamized roadway of Seventh Street road was the only object, and that if it could have been obtained elsewhere no digging down of Harewood road would have occurred. It shows that the grading or digging down of Harewood road was not a thing that the Commissioners or Twining or any one had decided upon or determined on as an improvement of Harewood road. All that was really wanted was the gravel that was found there.

The record also contains the following evidence:

"The *bed of Harewood* road where the cut was made *consisted of gravel*, which was hauled by defendant and its agents *to Seventh Street road for use there while repairing said Seventh Street road*" (Rec., p. 25).

In answer to the bill of discovery, defendant says—

"That in the summer of 1880 and again in 1881, in July and September, gravel was taken from Harewood road *for use on Seventh Street road*. The gravel taken from said Harewood road was in every instance used on a *public road* and *for the benefit of the public*. The orders for taking this gravel were given under the *supposition* that the road was public, and that *the fee* was in the *United States* or the *District of Columbia*" (Rec., pp. 30, 29).

Defendant's witness, John W. Ray, testifies—

"That in the *bed* of Harewood road there was a *gravel bed*, and the excavation or cut made in 1880 or 1881 was *through this gravel bed;* that this gravel bed was *good* for the purpose of *road-building*" (Rec., p. 35).

And plaintiffs gave evidence—

"That in making said cut or excavation the gravel was dug and removed down to the clay, *and then they dug no further*, and left the road-bed *unfinished* and *with holes and*

inequalities in it, and that the water in wet weather stood in the road *and could not run off*" (Rec., p. 32).

And defendant's witness, J. Enos Ray, says—

"That before the cut was made the water drained both ways; *that no provision was made for drainage and pools of water now collect on the roadway. That is because the road has never been rounded up and shaped off*" (Rec., p. 34).

Surely, merely excavating the gravel, digging down to the clay, and stopping as soon as they got through the gravel and reached the clay, and leaving the road-bed unfinished during all these long years from 1881 to 1898, with holes and inequalities in it, without any provision for drainage, so that pools of water constantly collect on the roadway and cannot run off because the road has never been rounded up or shaped off, shows or tends very strongly to show that the grading or improvement of Harewood road was not the purpose or object in view, and that the sole thing they were after was gravel for Seventh Street road.

Defendant's supposition that the fee of Harewood road was in the United States or the District of Columbia tends to explain why the District officers should think they could dig down Harewood road without establishing any grade or determining on any improvement of said Harewood road.

In answer to the bill of discovery, defendant says:

"Daily reports were made by William Beckett and J. E. Nervis to *J. J. Burrows, the general superintendent in charge of improving Seventh Street road*" (Rec., p. 31).

This further tends to show that the work Burrows had charge of was not the grading or improvement of Harewood road, but the macadamizing and improvement of Seventh Street road.

The record also contains the following evidence:

"That before the excavation and cutting was done *the grade* of Harewood road was comparatively easy" (Rec., p. 25).

And William Forsyth, the District surveyor, who made a survey and took the levels for the district attorney, proved that the excavation was 418 feet long and 14 feet deep (Rec., p. 32), establishing that the original and previous grade of Harewood road before this cut or excavation was made was less than $6\frac{7}{10}$ feet to the 100 over that portion of said road before it was cut down by the District.

And defendant's witness, W. P. Richards, testified that Harewood road east of said cut and excavation and between it and the southern end of Harewood road "had a grade of $12\frac{1}{10}$ feet to the hundred, and that no grading or change was made in this part of the road" (Rec., p. 39).

This evidence likewise tends to prove that the purpose was not to grade Harewood, for had that been the object in view they would have graded the part of the road where it had this steep ascent of $12\frac{1}{10}$ feet to the 100, instead of grading that part of said road where it had an easy rise of only $6\frac{7}{10}$ feet to the 100. Besides this, none of the gravel and material which was excavated from the top of the knoll was deposited at the foot of the hill or upon the lower part of Harewood road, as would have been done had the purpose and object been to grade Harewood road; but it was all hauled off to other and distant public roads.

The answer to the bill of discovery says that a small quantity was taken by George N. Beale, in June, 1880, for use on Bunker Hill road (Rec., p. 30), which at its nearest point was half a mile away (Rec., p. 21), and that all the rest of the gravel was taken from Harewood road in 1880 and 1881 for use on Seventh Street road (Rec., p. 30), and "that Seventh Street road was a separate and distinct road, running in another direction entirely, and about $1\frac{3}{4}$ miles from Harewood road" (Rec., p. 25).

The question of whether or not the acts complained of were done incident to the exercise of the power to grade Harewood road, or *solely* for the purpose of getting gravel for other public roads without any exercise of the power to

grade this particular road, was left fairly to the jury, and we submit, upon the authorities, that it was properly left to the jury, and that the evidence to which we have just called your attention was abundantly sufficient to sustain their verdict in favor of appellees on that question. We do not see how any jury could find the other way on such a showing.

In the next place, if, for the sake of the argument, we assume that Harewood road was a public road, in which the public authorities possessed no such incidental power to grade or improve it; or assume that it was not a public road at all, in which case the public authorities could possess no such incidental power to grade or improve it, or assume that it was a public highway of narrower width than the width of the contemplated cut or excavation and with incidental power to grade or improve it to the extent only of such narrower width, how would such an assumption affect the result?

In the first place, under §§ 252 to 262, R. S. D. C., *supra*, the Commissioners could, under such circumstances, have either laid out Harewood road as a new public road or straightened, widened, or altered it as an existing public road by condemnation proceedings under those sections, having the damages of the owner of the soil assessed and just compensation to the owner of the soil made, as therein provided. Such acquisition being clearly within the scope of the municipalities, charter powers, or statutory powers, their failure to pursue, follow, or observe such statutory prerequisites and requirements would not result in the acquisition, straightening, widening, or altering of Harewood road, being *ultra vires;* but, as we have already shown by the authorities cited above in this chapter, would merely make it a wrongful trespasses.

Furthermore, if the District or its Commissioners wanted gravel for the Seventh Street road (which we contend is just what was wanted, and all that was wanted, and

all that was sought to be obtained), the District or its Commissioners could unquestionably have gotten such gravel just where it was obtained, and could have done so whether the place from which it was obtained was exterior to the lines and limits of a common and public highway or was within the lines and limits of a common and public highway in which no power to grade or improve the same existed, and could unquestionably lawfully have obtained such gravel under such circumstances by condemning the same under and in accordance with the terms and provisions of § 267, R. S. D. C., *supra*, having the owner's damages assessed for the taking of such gravel and the injury resulting to the owner's close from digging and carrying away such gravel therefrom. By virtue of said § 267 gravel or any other material can be so condemned anywhere—even in the body of an owner's close—for repairing a highway, and it necessarily follows that if the public authorities have no power to grade or improve a highway or to use gravel in the bed of such highway because such power or right has never been acquired by the public from the owner of the fee, and the owner of the fee still holds and owns such gravel by title paramount to the public as a part of his quantum of interest and estate in the soil of the highway, the public authorities can condemn the same as such owner's private property for the repair of highways under said section 267, just exactly as they could do under that section were it exterior to the lines and limits of such highway and situate in the body of such owner's close.

We submit, therefore, that the acts complained of in this case could not possibly be *ultra vires*, because, whether the defendant had the power to grade or not, it unquestionably could, under its powers of condemnation aforesaid, have done what it did by exercising according to law its said powers of eminent domain.

The record shows that the acts complained of are corporate acts and constitute a corporate trespass, whether con-

sidered as having been done by the direction or authority of the District of Columbia or not, because there is in the record abundant evidence of their adoption and ratification by the defendant corporation.

Appellant's answer to the bill of discovery and interrogatories admits as follows:

"About July 1880 gravel, was taken from Harewood road for use on Bunker Hill road by George N. Beale, supervisor of roads, or by persons acting under him" (Rec., p. 29).

"In the summer of 1880 and again in 1881, in the months of July and September, gravel was taken from the same place for use on Seventh Street road" (Rec., pp. 30, 29).

"The amount of gravel taken by Mr. Beale cannot be accurately stated, as no account of it was taken, but it was comparatively small" (Rec., p. 30).

"The amount taken by Mr. Burrows *for use on Seventh Street road* can be stated exactly, as a tally was kept of every cart-load. The entire amount hauled to Seventh Street road was 3,958 cubic yards. *The orders for taking this gravel were given under the supposition that the road was public, and that the fee was in* the United States or the District of Columbia" (Rec., p. 30).

1. "A gang of laborers, with carts and wagons, under Foremen William Beckett and J. E. Nervis, were employed digging and hauling gravel from Harewood road through land in question *for use in the improvement of Seventh Street road* in 1880 and 1881" (Rec., pp. 27, 30).

2. "William Beckett had charge, as a foreman, of the force from July 6, 1880, to July 20, 1880, and from August 1, 1881, to August 5, 1881, and J. E. Nervis had charge, as a foreman, of the force from July 21, 1880, to July 31, 1880, and from August 6, 1881, to September 29, 1881" (Rec., pp. 27, 30).

3. "William Beckett and J. E. Nervis were present, superintending and in charge of the laborers digging and hauling gravel as answered above" (Rec., pp. 27, 30).

4. "The persons engaged in digging and hauling away gravel, as aforesaid, were paid by the day" (Rec., pp. 27, 30).

5. "*The persons who dug and hauled away gravel, as aforesaid, were employed by the District of Columbia to do said work*" (Rec., pp. 27, 30).

6. "*They were paid by the auditor of the District of Columbia*

by warrants on the Treasury of the United States" (Rec., pp. 27, 30).

7. "*They were paid for doing said work by the District of Columbia through its officers, and the person who paid them made such payment as an officer, agent, and employé of the District of Columbia*" (Rec., pp. 27, 30).

8. "*They were paid therefor out of funds belonging to the District of Columbia*" (Rec., pp. 27, 31).

9. "Those who hauled said gravel from said tract of 74 acres 2 roods and 3 perches to points beyond its limits were paid by the day" (Rec., pp. 27, 28, 31).

10 "George Beale, John King, and William Beckett were *officers, agents, and employees* of the District of Columbia, and were *as such placed above or in charge of those* engaged in digging gravel in the limits of said 74 acres 2 roods and 3 perches and in hauling the same away therefrom beyond said limits" (Rec., pp. 28, 31).

11. "Daily reports were made by William Beckett and J. E. Nervis to *J. J. Burrows, the general superintendent in charge of improving Seventh Street road,*" &c. (Rec., pp. 28, 31).

14. "The names of the persons who committed the acts complained of and the names of the persons who were present superintending and in charge of those who committed said acts *and by whose and what orders, directions, and authority said acts were committed are ascertainable by these defendants* as answered by No. 11."

"The amount of gravel hauled to Seventh Street road in 1881 was 2,986 cubic yards and in 1880 was 972 cubic yards, making in all from said Harewood road 3,958 cubic yards hauled to Seventh Street road" (Rec., pp. 29, 31).

These admissions are alone sufficient to establish that the acts complained of were corporate acts—*i. e.*, corporate trespasses.

Moreover, in this very case appellant's second and third additional pleas to plaintiffs' amended declaration are both pleas in confession and avoidance. Said second additional plea, after reciting the acts complained of, says:

"*Wherefore the said defendant, in its own right and by its servants*, at the said several times when the said several supposed trespasses are supposed to have been done, *committed the said*

several supposed trespasses in the said several counts of the said declaration mentioned in the said close," &c. (Rec., p. 14).

Although this plea was held bad on demurrer, it still stands as an admission in the case, and is just as much an admission that the acts complained of are the corporate acts of the defendant as though the plea had not been ruled out on demurrer.

And said third additional plea, after the preliminary recitals and the assertion of a right of common and public highway over testator's land, says:

"*It entered upon the same as it lawfully might, and removed certain gravel, soil and subsoil and used the same in the improvement of certain other public highways in said District* communicating with and intersecting the Glenwood or Harewood road aforesaid" &c. (Rec., p. 15).

Here again we have a clear confession or admission that the acts complained of were appellant's own corporate acts, or at any rate an adoption or ratification of them as its own corporate acts.

Moreover, appellant's attorneys admitted in open court at the trial table that defendant committed the acts complained of, but denied its liability because it claimed the right to do the same, and the court, in its charge to the jury (which is embodied in the bill of exceptions), alludes to this admission in the following manner, saying:

"The defendant admits the digging of the trench, and the removal of the earth and gravel, but denies its liability to respond in damages, because the defendant says its officers and agents had the right to do the digging and removal of gravel" (Rec., p. 48).

Appellant having admitted that the acts were its acts in the answer to the bill for discovery, as aforesaid, having admitted the same thing by its second and third pleas to the amended declaration, and finally *not* having introduced any

evidence under its plea of not guilty tending to show that the acts complained of were not its acts, but, on the contrary, having admitted at the trial table that the acts complained of were its acts, and having rested its defense *solely* upon its third additional plea of common and public highway and not having raised the question of *ultra vires* or of *respondeat superior* on any prayer or instruction in the trial court, we submit that those questions cannot be raised in this court; and we further submit that for the reasons stated above, even if they were before this court, that upon the record in this case they would avail appellant nothing and could not be sustained.

In this connection it is proper for us to say that the trial court proceeded upon the theory all through the case that if appellant, having a right of highway and power to grade the same, excavated beyond the width of and in excess of its right of highway, it would be justified *pro tanto*, and would only be liable for the injuries resulting from such excess in the exercise of its power to grade.

We understand the rule to be as follows:

In *equity*, an excess in the exercise of a power, *if separable*, is valid *pro tanto*, and void only as to the excess; if the excess is not separable, then it will be void *in toto*.

At *law*, however, such excess in the execution of a power is *fatal*, and such excessive execution is void *in toto*, whether the excess be separable or inseparable.

2 Sugden on Powers, *76, 78.
Roe *vs.* Predeaux, 10 East., 158.
Fritz., 157; Hard., 398.

We submit that because a board of officers in the exercise of their united judgment conclude that it will be to the interest and advantage of the public for them to grade a broad, handsome avenue, it does not follow, and cannot be assumed, that such board of officers would necessarily

deem it of equal public interest and advantage for them to grade a narrow alley. Because they see fit to exercise their power to grade in the one case, it does not follow that they would exercise their power to grade in the other case. Moreover, in deciding upon and establishing the grade of the broad avenue their minds would not, as a matter of fact, ever have met upon the question of grading the narrow alley. There would have been no exercise whatever of their judgment and discretion upon the question of grading such alley. It seems to us that such exercise of the power to grade as to an excessive width would be fatally defective as to the whole width; that it would be void *in toto* and not merely void as to the excess. Should the public authorities proceed to condemn a highway 200 feet wide, when a statute prohibits their condemning highways of more than 50 feet in width, surely the land-owner could maintain that the proceeding must fall as a whole and be void *in toto*, surely the public would not be permitted to say either in a court of *law* or *equity* that such a proceeding would be good and valid *pro tanto* and only void as to the excess. We submit that the theory upon which the court below proceeded was too favorable to appellant and prejudicial to appellees.

XIII.

Plaintiffs' thirteenth prayer, as granted, is as follows:

"If the issues joined upon both of the defendant's pleas, which issues are submitted to the jury, are found by them in favor of the plaintiffs, then they are instructed that they may assess such damages in favor of the plaintiffs as they believe from the evidence would make the plaintiffs whole, and may enhance the damages by any sum not greater than the interest on the amount from August 28, 1882, when this action was brought, to the time of this trial, if the jury shall find from the evidence that such allowance would be reasonable and just" (Rec., pp. 43, 44, 58).

Both on principle and authority, this proposition is undoubtedly correct.

In *trover and conversion* it is generally held that the plaintiff may recover as compensatory damages the value of the property at the time of conversion, with interest thereon from the conversion to the time of trial, or with an amount not exceeding such interest, added.

Parrott *vs.* Housatonic R. R. Co., 47 Conn., 576, 577.
Collier *vs.* Lyon, 18 Ga., 650.

In a Maryland case the court say:

"The general rule is, doubtless, in actions for conversions, that the value of the thing converted, at the time of conversion, with interest to the time of trial, afford the proper measure of damages."

Andrews *vs.* Clark, 72 Md., 440.

In another Maryland case, where the trial court's instruction to the jury in an action of trover fixed as the measure of damages the value of the goods, &c., "*with interest thereon from the time they were passed over to the United States*," the court above say:

"The error is supposed to consist in allowing the jury to assess interest, but no authority has been cited to show that in *trover* interest upon the value of the goods from the time of the conversion, may not be recovered as damages. As was said by Lord Hardwicke, in Eakins *vs.* East India Company, 1 Peere Wms., 395, 'If a man has my money by way of loan, he ought to answer interest; but if he detains my money from me wrongfully, he ought *a fortiori* to answer interest, and it is still stronger, where one by wrong takes from me either my money or my goods which I am trading with, in order to turn them into money.' That is the equitable rule, and there is nothing in the form of action to make it inapplicable to a case of *trover* (citing authorities). This is the rule in Maryland. In Hepburn *vs.* Sewell, 5 H. and J., 212, the court said, In *trover* the plaintiff 'selects the date of the conversion as the epoch of the defendant's responsibility, and claims from him the value of the property at that

period, *with interest to the time of taking the verdict.*' Finding no error in the ruling of the superior court, the judgment will be affirmed."

Thomas *vs.* Sternheimer, 29 Md., 272, 273.

"It is the settled law in this State, that the measure of damages is the value of the property taken, *with interest from the taking to the time of verdict.*"

Hopper *vs.* Haines, 71 Md., 76.

In a still later case the court of appeals of Maryland, in an action of trover, say:

"When the verdict is for the plaintiff, the measure of damages in this action is the value of the goods at the time of the conversion, *with interest from that time to the day of the verdict.*"

Heinekamp & Son *vs.* Beaty, 74 Md., 393.

So in *trespass* for taking or destroying property (if the case be one where exemplary damages ought not to be assessed), it is generally held that the plaintiff may recover, as compensatory damages, the value of the property at the time of such taking or destruction, with interest thereon from the taking or destruction to the time of trial, or with an amount not exceeding such interest, added.

Parrott *vs.* Housatonic R. R. Co., 47 Conn., 577.

Plumb *vs.* Ives, 39 Conn., 127.

So, too, in *trespass on the case* for the destruction of property it is generally held that the plaintiff may recover as compensatory damages the value of the property at the time of such destruction, with interest thereon from the destruction to the time of trial, or with an amount not exceeding such interest added.

In an action of trespass on the case the court, Park, C. J., say:

"Whenever a party is liable in damages for the destruction of the property of another he is bound at least to make

good the owner's loss. This is the smallest amount of damages which the rules of law allow. In cases of trover where property has been taken the rule is that the plaintiff is entitled to recover the actual value of the property at the time of its conversion by the defendant, with interest on the amount to the day of the judgment. It is only thus that the plaintiff can be made whole. The interest thus allowed is not technically interest, *but an addition to the damages of a sum equal to interest.*

"If the plaintiff's property is taken or destroyed, the rule as to damages should be the same, whatever the form of action may be. * * * We think therefore that the court below erred in not allowing as a part of the damages, a sum of money equal to interest on the value of the property destroyed by the fire, from the date of the destruction of it to the time the judgment was rendered."

Parrott *vs.* Housatonic R. R. Co., 47 Conn., 576, 577.

In a Georgia case, for tortiously killing a bull, the court, Crawford, J., say:

"The court charged that in case the jury found for the plaintiff they should give him the value of the bull at the time of the killing, *and that they might give legal interest thereon from the date of the killing to the trial*, not as interest, *but as damages*, adding it to the principal, and making a verdict for the aggregate amount."

Railroad Co. *vs.* McCauley, 68 Ga., 818.

"In an action on the case to recover for an *injury* to property, &c., it is proper to allow the plaintiff *interest from the time the injury was done.*"

C. & N. R'y Co. *vs.* Shultz, 55 Ill., 421.

Where in an Iowa case the court directed the jury *to add interest* to the value of the property at the time it was destroyed, the court above say:

"We think it is a correct and just rule for determining the measure of damages in cases of this character. The object of the law in awarding damages is to render to the injured party just and full compensation. The defendant was deprived of his property by the fire. He was entitled

at that moment to recover its value. *He ought to have the legal interest for the time compensation was withheld from him.*"

Johnson *vs.* The Chicago, etc., R. R. Co., 77 Iowa, 669.

In an action of trespass on the case in Ohio for killing a horse the court say:

"There was no error in instructing the jury to return a verdict for the value of the plaintiff's horse, *with interest from the date of the accident.* The agreed value of the horse was $140. The plaintiff was deprived of this from the time of the accident; *and for the time it was withheld from him he was entitled to be compensated.* This upon the presumption of course, that he was entitled to recover in the action."

Railroad *vs.* Schaltz, 43 Ohio St., 275.

In a similar action the court, Zane, C. J., say:

"When the property of one person is destroyed by the wrongful or negligent act of another person justice demands that the latter shall compensate the former for the loss. The latter is entitled to compensation *at the time of the loss,* and if the person doing the injury does not do so, and *retains* the compensation, *he ought to pay the person whom he has wrongfully kept out of it a sum equal to the value of its use.* The rate of interest should be fixed by analogy to the per cent. allowed by the law regulating interest. The weight of the authorities is to the effect, as we think, *that interest may be given as damages,* where the plaintiff has been deprived of his property by the wrongful act or neglect of the defendant, *and the latter delays payment.*"

Woodland *vs.* Union Pac. R'y Co., 26 Pacific Rep., 298, 299.

In an action to recover damages for cutting and removing timber from plaintiff's land the trial court charged the jury:

"If you should find from the evidence that the plaintiff is entitled to a certain amount of damages, then you have a right, if you see proper (and that is left with the jury), to go further with your investigation *and ascertain what amount of interest has accrued from the time that damage was sustained,* and

render that with your verdict. *Calculate the interest upon the amount that you find the plaintiff is entitled to recover from the time of the damages up to the rendition of your verdict*, and add it in as a part of your verdict."

The court above, Simmons, C. J., say:

"In all cases of tort of this character it is within the discretion of the jury to take into account *interest as part of the damages and add it to their verdict*, but not to give it as interest *eo nomine*. The court, therefore, did not err in charging the jury as above set forth."

Gress Lumber Co. *vs.* Coody, 104 Ga., 613.

In another Georgia case, which was an action of tort for killing plaintiff's jennet, the trial court instructed the jury:

"You will in measuring the damage, find, &c., what the jennet was worth at the time she was killed; and to this amount *you may, if you see fit, add interest up to the present time.*"

The court above say:

"The jury *may*, in the lawful exercise of their power, *add* to the value of the property destroyed *a sum equal to the interest on such value;* not that they *must* but *may* in the exercise of their judgment and discretion. Such in effect we understand to have been the charge of the court."

Western, &c., R. R. Co. *vs.* Brown, 102 Ga., 15, 16.

In all actions of tort to property, even such as are brought to recover purely unliquidated damages for destruction of property or for *injuries* to real or personal property which diminish its value, the jury, if they find for the plaintiff, are entitled to allow the plaintiff damages suffered and sustained by him by destruction of his property or by the *diminution in its value*, as the case may be, resulting from defendant's tortious acts, and *may* enhance such damages by a sum not exceeding legal interest thereon from the commission of the

tortious acts to the time of the trial if, in the exercise of their judgment and discretion, the jury see fit so to do.

In support of this proposition we call your attention to the following authorities:

"The measure of the loser's damages is the *value* of his property destroyed at the time of its destruction. Why at the time of destruction? Because it is at that time that the destroyer becomes liable for such value. The loser, before and at the time of such destruction was entitled to his property, and the beneficial use of it, and *instantly* upon such destruction, becomes under the law entitled to its value in money at the hands of the wrong-doer, and can sue *instantly* for such value. Because through the laws' delay, no opportunity is afforded to have the amount of that value declared by a jury for a year, perhaps several years, *is it right that the loser shall during all that time be kept out of both his property, its use, and its value without some remuneration for the retention by the wrong-doer of such value? Upon every principle of right we cannot think so.* The theory of the measure of liability in such cases is *just compensation.* We cannot see either *justice* or *completeness* of the compensation dispensed under a rule that declares a party who wrongfully destroys another's property to be liable *at the time of such destruction for the value thereof, but that permits the wrong-doer to withhold such value for years without some compensation for such retention.* We cannot appreciate the force of the argument of the learned judge in Aucrum *vs.* Sloan[1] *supra,* 'that to allow interest in an action for damages would be to allow damages on damages.' It is true that in a certain sense it is an allowance of damages on damages (interest being a species of damages), but it is not an allowance of damages on damages, *for the same cause of damage.* In the one case the principal sum—the value of the property destroyed—is awarded as damage for the wrongful *destruction;* in the other, interest is allowed as damages for the wrongful *detention of such value.* In Chapman *vs.* Chicago & N. W. R'y Co., 26 Wis., 304, Chief Justice Dixon says: 'In trespass, trover or replevin for the same property taken or converted by the defendants such would have been the legal rule of damages, or rather the value with interest from the time of the taking or conversion. Why should not the same rule prevail in this action? We are at a loss to assign any

good reason for the distinction, if it can be said that it exists, or if it can be said to be in the discretion of the jury to give interest by way of damages in this case, whilst in the other they must give it as a matter of strict legal right. We say we can see no good reason for the discrimination. The object of the rule, or of any rule of damages in any of the cases, is to give just and full compensation for losses actually sustained. It is obvious, regard being had to such compensation, which constitutes the foundation of the rule, that the giving of interest is as essential in this case as in any of the others. It is immaterial to the party who has lost his property, whether it has been taken and converted, or negligently destroyed by the other.

"'His loss is the same in either case, and in either case he should be entitled to the same compensation.'

"This view of the law accords fully with ours, and seems to be sustained also by the following authorities (citing them). The established measure of damages in such cases being complete compensation, we feel that it would be doing a positive wrong to the plaintiff were we, because of these instructions on the question, to order either a new trial or a remittittur of this sum to which, upon every principle of right, the plaintiff is justly entitled."

Jacksonville, etc., R'y Co. *vs.* Peninsular Land, etc., Co., 27 Fla., 143 to 146.

S. P., Pittsburg, etc., R'y Co. *vs.* Swinney, executrix, 97 Ind., 596–598.

In an action of tort to recover damages for *injury* to growing timber set on fire by defendant's locomotive engines, the court above say:

"The court instructed the jury * * * that the measure of damages was 'the *difference* between the value of the timber standing and growing upon the land in question immediately before the fire in question and the value of such timber immediately after such fire. That if they found the plaintiff entitled to recover *they should add to the difference in value of the timber an amount equal to 6 per cent. per annum from the date of the fire to the finding of the verdict.*'

"It is claimed that it was error to direct the jury *to add interest to the damages.* THE INSTRUCTION WAS NOT ERRONEOUS. The judgment of the district court is affirmed."

Burdick *vs.* Chicago, etc., R'y Co., 87 Iowa, 387, 388.

In an action of tort for destruction of plaintiff's buildings, dam, water privilege, and personalty, the supreme court of Massachusetts say:

"The only question is whether the tribunal assessing the damages had power, in its discretion, to add interest to the sum which it found to represent the plaintiff's loss on the day it took place. * * * Interest is allowed in the admiralty upon damages for collision, and other courts have adopted the admiralty doctrine. * * * We have heard no reason suggested why, *if a plaintiff has been prevented from having his damages ascertained, and, in that sense, has been kept out of the sum that would have made him whole at the time, so long that that sum is no longer an indemnity, the jury, in their discretion, and as incident to determining the amount of the original loss, may not consider the delay caused by the defendant.* IN OUR OPINION THEY MAY DO SO; and, if they do, we do not see how they can do it more justly *than by taking interest on the original damages as a measure.*"

Frazer *vs.* Bigelow Carpet Co., 141 Mass., 127, 128.

In an action of tort to recover damages against a municipal corporation for negligence in the construction of a wall, in consequence of which the wall fell down and *injured* plaintiff's mill, the supreme court of New York *held:*

"The damages recovered should be *for the actual injury sustained* by the plaintiff, *with interest thereon from the time of the injury.*"

Ludlow *vs.* The Village of Yonkers, 43 Barb. (N. Y.), 493.

In an action of tort to recover damages for the erection of a dam below plaintiff's saw-mill, which set back the water upon plaintiff's wheel, the court, Selden, J., say:

"The jury were not instructed to allow interest, *but its allowance was submitted to their discretion. There was no error in this.* In general in actions *ex delicto*, it is in the discretion of the jury whether to allow interest *by way of damages* or not. There is no ground for making this case an exception to the rule."

Walrath *vs.* Redfield, 18 N. Y., 462.

So in an action of tort, where the question was one of *purely unliquidated damages* to be assessed by a jury, the court say:

"The rule in such cases has been to leave the question to the jury, not only as to the amount of damages, but as to the question of interest. * * * I think this is the true rule, and where a jury are instructed, &c., to award the damages the plaintiff has sustained the court may leave to them to say *whether on such damages the plaintiff is entitled to interest.*"

Black *vs.* Camden, etc., Co., 45 Barb. (N. Y.), 43, 44.

And in an action of tort for *injuries* to personalty the court say:

"In actions of this kind, for the recovery of damages for *injuries* to personal property, the plaintiff is not entitled absolutely, and as matter of law, to recover interest upon the amount of the damages immediately caused by the negligence, but the jury in assessing the damages should add interest, if in their judgment, that be necessary to give full compensation."

Reiss *vs.* N. Y. Steam Co., 59 N. Y. Sup. Ct., 58.

In a recent action of tort to recover damages for *injuries* to a stallion, the court of appeals of New York, in 1892, say:

"We think the rule is now settled in this State that where the value of property is *diminished* by an *injury* wrongfully inflicted the jury *may*, in their discretion, *give interest on the amount by which the value is diminished from the time of the injury.* This is the rule laid down in the elementary books and sustained by the adjudged cases" (citing authorities).

"There is a class of actions sounding in tort in which interest is not allowable at all, such as assault and battery, slander, libel, seduction, false imprisonment, &c. There is another class in which the law gives interest on the loss as part of the damages, such as trover, trespass, replevin, &c. And still a third class in which interest cannot be recovered as of right, *but may be allowed in the discretion of* the jury, according to the circumstances of the case. This action belongs to the latter class, and, as we have construed

the charge *as a direction that the jury* MIGHT, *in their discretion, allow interest on the* DIMINISHED VALUE *of the horse*, IT IS NOT ERRONEOUS."

Wilson *vs.* City of Troy, 135 N. Y., 105, affirming 60 Hun. (N. Y.), 187, 188.

And in an action of tort for *injury to lands*, the court of appeals of New York in 1884 said:

"It is well settled that in an action of tort like this to recover even *unliquidated damages*, THE ALLOWANCE OF INTEREST BY WAY OF DAMAGES IS IN THE DISCRETION OF THE JURY. * * * * The discretion of the jury on this question was exercised, and they have found the amount of the interest as part of the damages suffered by the plaintiff, and we see no reason to disturb the judgment on that ground."

Duryee *vs.* Mayor, &c., of New York, 96 N. Y., 499.

S. P., Mairs *vs.* Manhattan R. E. Ass'n, 89 N. Y., 507.

"The rule in actions of tort to recover *unliquidated damages* is that the jury *may* award interest in their verdict, but are not bound to do so."

1896—Brush *vs.* Long Island R. R. Co., 10 N. Y. App. Div., 540.

S. P., 1896—Jamieson *vs.* N. Y., etc., R'y Co., 11 N. Y. App. Div., 54.

In an action of tort to recover damages for *injury* to plaintiff's house and by reason of the construction of defendant's road, the appellate court say:

"Nor was there error in the charge of the court in respect to the amount of damages. The rule of damages in such case is compensation for the injury, or, in other words, that the injured party should be made whole. And whilst it is true that such a claim is not one, which, under the statute, bears interest, nevertheless, *if reparation, for the injury is delayed for a long time by the wrong-doer*, the injured party cannot be made whole unless the damages awarded *include compensation, in the nature of interest, for withholding the reparation which ought to have been promptly made.*"

Railroad Co. *vs.* Cobb, 35 Ohio St., 98, 99.

In an action of trespass on the case against a company to recover damages for turning into its pasture a lot of cattle which broke into plaintiff's pasture and gave plaintiff's blooded cattle, running therein, Texas fever, the appellate court say:

"The court instructed the jury to allow as part of the damages *interest* on the value of the cattle that died, and upon *the lessened value* of those that were *injured* and did not die; and appellant asserts the proposition that this was error. * * * We think the rule is now quite well settled in this State that interest is allowed as part of the damages caused by the wrongful destruction of *or injury to* property. *Interest is allowed as the measure of the damages for the detention of money which should have been paid at the time of the injury,* and the reasons for its allowance are as cogent in the one case as in the other."

1895—Clarendon, etc., Co. *vs.* McClelland, 31 Southwestern Rep., pp. 1088, 1089.

In an action of tort against a railroad brought by the owners of real estate to recover damages for injuries to their property caused by the construction of defendant's railroad, the trial court instructed the jury:

"You will ascertain *the difference in the market value* of the interests which the plaintiffs have in that property, &c. Should you come to the conclusion as to a certain amount which should be allowed plaintiffs, you will add to that amount interest from June, 1885, to the present time."

The court above, Paxson, C. J., say:

"The portion of the charge referred to, &c., is technically inaccurate, although substantially correct. In cases of this kind interest is not allowed as interest, *but it is usual to instruct the jury to increase the damages by that amount.* In other words, interest is allowed *as damages.* If it were otherwise a person whose property has been *taken, injured* or destroyed would not receive full satisfaction (citing authorities). Judgment affirmed."

Penn. S. V. R. Co. *vs.* Ziemer, 124 Pa. St., 571.

This court, in a case that came before it, speaking of the allowance of interest, said:

"In cases of tort its allowance *as damages* rests in the discretion of the jury."

Lincoln *vs.* Claflin, 7 Wall., 139.

And in another case this court said:

"The value of the property lost, at the time of the loss, and in case of *injury*, the *diminution in value* by reason of the injury, *with interest upon such valuation*, afford the true measure for assessing damages. This rule may not secure a complete indemnity for all possible injuries; but it has certainty and general applicability to recommend it, and in almost all cases, will give a fair and just recompense."

The Amiable Nancy, 3 Wheat., 560, 561.

In an action of tort brought against a railroad to recover damages for injury done to plaintiff's real and personal property the Indiana appellate court say:

"Where, in an action of tort, damages, not exemplary, are found to be due the plaintiff, the jury trying the cause *may*, in its discretion, *add interest to the sum which it finds to represent the loss*."

1891—The Chicago, etc., R. R. Co. *vs.* Barnes, 2 Ind. App. Ct. Reports (2 Griffiths), 221.

S. P., 1891—The Wabash R. R. Co. *vs.* Williamson, 3 Ind. App. Ct. Reports (3 Griffiths), 205.

1895—Gulf, etc., Co. *vs.* Jagoe, 32 Southwestern Rep., 719.

In a Maryland case it was *held* in trespass *de bonis asportatis*:

"If the goods be returned, the plaintiff is entitled to recover the amount of the *injury done to them*, with interest thereon from the time of the taking down to the trial."

Moore *vs.* Schultz, 31 Md., 423.

Mr. Sutherland in his work on Damages says:

"Interest *may* be allowed in the discretion of the jury on

the damages, but it is error to instruct the jury *to* allow interest as a matter of legal *right*."

3 Sutherland on Damages, p. 383; see also 1 Sutherland on Damages, pp. 534, 629.

In an action of tort to recover damages against a railroad for obstructing access to unimproved real estate, if the evidence shows that plaintiff was actually endeavoring to sell his property, and at that time there was a certain market price for it were the obstruction removed, but with it remaining only a certain lower price, it was *held:*

"The jury may find that plaintiff had been *deprived* by this nuisance from receiving *the difference* between these two prices, and *may* render their verdict for such amount, *with legal interest from the time plaintiff had been so deprived.*"

Hetzel *vs.* B. & O. R. R. Co., 6 Mackey, 1, 3, 4.

In a case which came before the Court of Appeals of this District that court, Alvey, Ch. J., say:

"In actions of tort, interest can only be allowed *as damages*, and whether it shall be allowed or not rests entirely in the discretion of the jury, in arriving at what is a fair and just indemnity of the plaintiff for the wrong suffered."

1898—Railroad Co. *vs.* Hickey, 12 App. Cases D. C., 276.

The foregoing authorities establish beyond all controversy that the court is entirely right in instructing the jury, as it does in plaintiffs' thirteenth prayer, that they "*may* enhance the damages by any sum not greater than the interest on the amount from August 28, 1882, when this action was brought, to the time of this trial, if the jury shall find from the evidence that such allowance would be reasonable and just" (Rec., p. 58). You will observe that the court only tells the jury that they *may*, not that they *must*, enhance the damages by a sum not exceeding such interest. It is left entirely to the judgment and discretion of the jury. They may make such allowance if they find it would be reasonable and just. They

can do so or not, as they see fit; and you will observe that the court instructs the jury not that they may enhance the damages by interest *co nomine*, but by a sum not greater than interest for the period indicated.

In short, this instruction permits interest not *co nomine*, but as damages, to be added. You will observe, however, that the period prescribed by this instruction, instead of being from the *commission of the trespasses* to the time of the *verdict*, was only from the *commencement of the action* to the time of the *trial*, thus curtailing the period which should have been prescribed at its *commencement* as well as at its *end*. In this respect plaintiffs' 13th prayer was too favorable to the appellant and too unfavorable to appellees; but of this the appellant cannot complain.

The court in its charge to the jury indicates very clearly and distinctly just what are the damages, which the jury may so enhance. In that connection it charged the jury as follows:

"Now, *the measure of damages*, if you find for the plaintiffs, is very different, if you find that there was no road, from what it will be if you find that there was a road by prescription narrower than the excavation. If you should find for the plaintiffs on the theory that there is no road there at all, or if you should find for the plaintiffs upon the theory that, although there may be a road, the gravel was not taken in pursuance of the power to grade, but for the purpose of getting gravel to use elsewhere, in either of those suppositions the plaintiffs would be entitled to what I will call *full damages*—that is, *damages for everything that was done there*—and upon that point I have granted an instruction at the instance of the plaintiffs. It is their instruction numbered 13." [The court at this point read plaintiffs' thirteenth prayer to the jury, and then continued its charge to the jury as follows:]

"That is very brief and to the point; but perhaps it needs a word or two of explanation. If you find, as I said before, for the plaintiffs on the ground that there was no road there at all, or that the gravel was not taken in pursuance of the power of grading, *then they are entitled to damages for all that*

was done there. They are entitled to compensation for all the soil that was removed and for such incidental damages to the residue of the tract as was occasioned by the removal of what was removed. In determining what would be the incidental damages, you would be entitled to take into consideration any, if any, benefit it was to the property to have that grading done there and to have that road graded down. There has been considerable evidence here in regard to using this property for building purposes or other purposes, the necessity of grading it occasioned by this cutting of this trench through there. One theory, the theory of the plaintiffs, seems to be that they could not use it very well for the purposes they desire without grading it very much. The theory of the defendant, on the other hand, seems to be that it could be terraced without much expense and be just as valuable, or more so, than it was before. Now, that is all for you, gentlemen, for you to determine what the effect of cutting that trench there was, and if you find that it was done without any authority at all *the criterion that you should go by in determining what the damages should be would be to ask yourselves the question what, under all the evidence, was the effect upon the value of the property by doing that,* and in determining that you should ask what uses the property could be put to, whether it would be best and more reasonable or more feasible to grade down there or whether it would be better and more feasible to terrace it, BUT IN THE END THE QUESTION IS, HOW MUCH WAS THE MONEY VALUE OF THAT PROPERTY DECREASED BY CUTTING THAT TRENCH THROUGH THERE? It is the money value of it that you have to consider. Something has been said about the beautiful view there, and that if you grade it down it might affect the view and all that. You are to take that into consideration; the subject of the view and the locality of the property and all that you are to take into consideration *only so far as it might affect the cash value of the property. If the property was more valuable with the view as a matter of cash, why then* you take that into consideration; but if the matter of view was simply the idea of the owner and it did not render the property *any more valuable in money because of the view,* why then he would not be entitled to any compensation in that regard. Now, *that is the theory upon which you would assess the damages* if you find

that the defendant had no right to do anything that it did there" (Rec., pp. 58, 59).

This quotation from the court's charge may be summed up as follows, viz: It instructs the jury that what the court calls *full damages—damages for everything that was done there*—consists of compensation for the *gravel* that was removed and compensation for such *incidental damages to the residue of the tract* as was occasioned by the removal of what was removed, the question as to the latter being how much the money value of the property was *decreased* by cutting that trench through there.

The italicized portions of the foregoing quotation from the court's charge show clearly and distinctly that such were the damages which plaintiffs' 13th prayer as granted instructed the jury they might enhance as therein set forth. We submit that under the authorities to which we have referred there is no error in plaintiffs' 13th prayer as granted, and unquestionably there is no error in it when read in connection with the court's charge to the jury upon the measure of damages.

XIV.

In the trial court appellant referred to the following statement in defendant's answer to the bill of discovery:

"These defendants further say *that the cutting of the road was done with a view to improve the grade of said road*, and greatly improved it by cutting off the top of a small hill, which had a steep ascent on each side, by which the complainant was especially and largely benefited" (Rec., p. 30).

Appellant contends in support of their twenty-third prayer that plaintiffs were bound by this statement, and that the jury were not at liberty to ignore it or to find the facts the other way.

Appellant is in error about this matter, however. In the first place, although the bill prayed a discovery as to the

quantity of gravel taken, where it was taken, what was done with it, who committed the acts complained of, who were in charge of them, whether the trespassers were officers, agents, or employés of the District, whether they did the acts as such, whether they were paid, and whether the District got the benefit of the gravel, &c., yet it nowhere asked *why* or *for what purpose or object* the acts were done, but scrupulously avoided doing so, and the statement above quoted was not responsive to the bill, and not being responsive to the bill, would have to be affirmatively proved by appellant, and would not itself constitute evidence against appellees at all.

Even so far as an answer is responsive to the bill, it has no such effect *in a court of law* as appellants claim for it. It is no more binding or conclusive upon appellees or upon the jury than if plaintiffs had called the commissioners, &c., and put them on the witness stand and they had testified to just what is stated in said answer.

Appellees would not be bound or concluded by or estopped from denying what they testified to, or from introducing any other evidence or witnesses to show the facts to be the other way. We have already called your attention to the strong and convincing proof that the fact was just the other way (*ante*, pp. 229 to 234). In a court of law the jury is always the judge of just how much weight or credibility should be given to any witness or evidence before them. The equity rule has nothing to do with it when introduced as evidence before a jury in a court of law.

In a court of law such an answer is but the solemn admission of a party to the controversy.

Nowhere is the law upon this subject more clearly stated than in a Virginia case, where the answer to a bill for mere discovery was read in evidence. The court, Baldwin, J., say:

"The force and effect of the defendant's answer in this case is to be determined, not by treating it as matter of

pleading, but as matter of *evidence*. When a plaintiff comes into a court of equity, in order to obtain redress in that forum, upon a subject falling within its equitable jurisdiction, the facts charged in the bill and admitted in the answer are to be taken as true, because conceded *in pleading*. But if the answer goes further and sets up *other facts* in avoidance of what has been so admitted, *those facts* must be established *by evidence*. *And in these respects the rules of law and equity are the same*. But equity goes a step beyond the law, and requires that an allegation in the bill which is denied in the answer, shall be proved by two witnesses, or one witness and strong corroborating circumstances, and hence the responsive answer is said to be evidence for the defendant.

"A bill, however, which seeks a *discovery* from the defendant, in regard to a demand or defense properly cognizable at law, but which cannot be established there for want of proofs, *gives to the answer of the defendant a different force and effect*.

"The answer in such a case is to be treated as matter of *evidence*, and *not* as matter of *pleading;* and is to be used by the plaintiff obtaining it, *as evidence* on the trial of the controversy, before the proper forum. According to the English practice, that forum is, as a general rule, *a court of common law*, the chancery cause usually terminating with the discovery obtained, or the failure to obtain it. With us the general rule is the other way, the court of equity retaining the cause after the discovery has been obtained, and proceeding to give the proper relief founded upon it; instead of turning the parties over to a common-law tribunal, in order that the answer may be used as evidence there; unless, indeed, the discovery was sought and obtained in order to be used in a pending common-law action between the parties.

"The effect of treating the answer to a bill of discovery *as evidence* is, that on the trial before the proper forum, whether of law or equity, *the whole of it is to be read, if used at all, as the testimony of a witness; but of a witness deposing in his own cause, and whose admissions against himself are to be taken as true, while his assertions against his adversary may be disproved or discredited and are subject to the ordinary tests of consistency, probability and candor, or the reverse.*

"*The answer gains no artificial force by being responsive to the bill;* nor is any part of it pertinent to the discovery to be rejected, because affirmative matter in avoidance of that

which is admitted to be true. * * * The answer to such a bill does not make up issues to be tried in the cause, *but furnishes evidence to be used collaterally on the trial of the common-law action, or on that which is substituted for it*, when the court of equity, to prevent circuity, expense and delay, undertakes itself to give or refuse redress after the discovery has been made.

"*On the common law trial, so much of the answer as makes in favor of the defendant may be disproved by its context, or by extrinsic evidence*, and on the other hand may be sustained by corroborating testimony; and this is equally true of the substituted trial in equity."

Lyons *vs.* Miller, 6 Gratton, 438, 439.

S. P., 1 Pomeroy's Eq. Jur., § 208.

We respectfully submit that defendant's twenty-third prayer (Rec., p. 48) was properly refused.

And upon the whole case we respectfully submit that the judgment of the Court of Appeals should be affirmed.

W. D. Davidge,
Attorney for Defendants in Error.

Leigh Robinson and
Conway Robinson, Jr.,
Executors of the Last Will and Testament of Conway Robinson, Deceased, Defendants in Error.